IN THE

Supreme Court of Georgia

MARCH TERM, 1914

NUMBER 32, ATLANTA CIRCUIT

LEO M. FRANK

Plaintiff in Error

v.

STATE OF GEORGIA

Defendant in Error

EXTRAORDINARY MOTION FOR NEW TRIAL

BRIEF FOR PLAINTIFF IN ERROR

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Johnson-Dallis Co., Printers, Atlanta, Ga.

LEO M. FRANK,
Plaintiff in Error,

vs.

STATE OF GEORGIA,
Defendant in Error.

No. 32

March Term, 1914

Criminal

BRIEF FOR PLAINTIFF IN ERROR

Frank was convicted of murder at the July term, 1913, of Fulton Superior Court. His motion for new trial was overruled. The case was carried to the Supreme Court of Georgia and affirmed at the October Term, 1913, the judgment of affirmance having been rendered on February 17th, 1914.

After the affirmance by the Supreme Court and on the 27th day of March, 1914, Frank gave notice to the State of Georgia, as provided in Section 6092 of the Civil Code and Section 1091 of the Criminal Code, of his intention to file an extraordinary motion for new trial, and accordingly, on the 16th day of April, 1914, did file an extraordinary motion for new trial, which was heard during the March Term of Fulton Superior Court.

Upon the hearing of the extraordinary motion for new trial, evidence was introduced in support of the same by the movant, and counter evidence was introduced by the State in opposition to the same.

The presiding judge refused to grant the extraordinary motion and the case is here upon bill of exceptions assigning error upon this action.

(Heavy face type, unless otherwise stated, is our own.)
(See Index to this Brief at end.)

THE ORIGINAL CASE.

In extraordinary motions for new trial it is an inherent necessity that the facts of the original trial be kept in the mind of the court. The fate of a case depends largely upon a comparison, in the light of legal principles, of the facts of the old trial with the facts newly discovered. The new facts themselves may be, when standing alone, of little apparent importance, but may have an irrestible force if compared with the facts in the original case.

"The question is not what the jury might do, but supposing all the evidence new and old to be before another, whether they ought not to give another verdict than that given before on the former trial."

"3. In order to warrant a new trial upon the ground of newly-discovered evidence, it should be made to appear that injustice is likely to be done by refusing it; and therefore it becomes necessary for the court to take into consideration the weight and importance of the new evidence, its bearing in connection with the evidence on the former trial, and even the credibility of witnesses. This rule is applicable not only to civil but criminal cases.

"4. A motion for a new trial should not be granted on the ground of newly-discovered evidence, unless the evidence is such as ought to produce on another trial an opposite result upon the merits.

"5. In considering the motion the court will not inquire whether, taking the newly-discovered evidence in connection with that exhibited on the trial, a jury might be induced to give a different verdict, but whether the legitimate effect of such evidence would require a different verdict."

State v. Stain, 20 Atl. 72.

We give, therefore, at the outset, a fair epitome of the facts brought before the jury in the original trial.

The brief of evidence in that trial was voluminous, but the controlling essential facts were comparatively few and simple.

We waive the suspicions and innuendoes which, even when distorted and exaggerated, could only cast possible suspicion upon Frank, and deal only with those facts which, if credible and uncontradicted, would be sufficient for conviction.

The only direct evidence was that of a negro, Jim Conley. The evidence shows, beyond dispute, that he was a low and brutal type of the African, with a slight smattering of education, the only use of which he had ever made was to make his brutality cunning.

He was impeached in every way recognized by the law.

A score of people testified to his general bad character and of his lack of credibility under oath. Members of his own race, people that had known him all his life, with one accord testified that he was unworthy of belief. Not a soul came to his rescue. The State with all its power, the police with their broad and intricate ramifications, were unable to find a living soul who would say one word for Conley's credibility. The prejudice against Frank was intense; the police department was in full cry upon his track. The State was using every expedient to bring about his ruin, and yet the combined efforts of the two could not, in the whole State of Georgia, find one man base enough to swear to Conley's credibility. In addition to showing lack of credibility, it was shown, without dispute, that he had a long criminal record. He belonged to that worthless class—the jetsam and flotsam of the negro race—that moved in the lowest elements of brutal negro society, and had a long familiarity with the police court.

At the outset Conley had not been suspicioned. The police net, without discrimination, and apparently without wise and prudent purpose, had been thrown out, and as a result of the haul Conley, together with several other parties, had been incarcerated. Without any apparent reason,

and without any authority, Conley was kept in jail some three or four weeks after the murder, before suspicion was directed to him.

True, he had been questioned by the police, especially as to his ability to write, but upon his denial that he could write he seems to have been passed by and practically forgotten by the police. The mind of a detective agency operative turned again, however, to Conley, and he began a systematic search to determine whether Conley could write, moved thereby with the design to connect Conley, if possible, with what has been called the "Murder Notes." Inquiry was made at the Pencil Factory, and through the factory with Frank himself. From this source it was found that Conley could write, and the detective was put upon the track of papers signed by Conley which would demonstrate that he could write.

When Conley was confronted by this detective, armed with the certain information that he could write, he admitted it, and from thence began to give out certain remarkable statements, which are designated as "Conley's Confessions."

On May 18th he gave a minute statement of his movements on the day of the murder. That statement begun as follows: "My full name is James Conley. I reside at 172 Rhodes street with Lorine Jones, who claims to be from Marietta, Ga. This woman is not my wife. I have been living with her a little over two years. I have been having intercourse with Lorine Jones." This first statement of his in connection with the Frank case gives a life-size portrait of this character. Then followed an itemization of his acts and doings from the time he got up in the morning until he went home that night. This statement appears on page 281 of the Brief of Evidence, and this Court is urged to read it. It was made up of idle, shiftless wanderings on Peters street, beer, whiskey, saloons and pan sausage.

Immediately after this statement Conley went through a police grilling and training constantly from that day until

the trial which, if the witness Scott is to be believed, has never heretofore been equaled in Fulton County, and it is to be hoped in the interest of justice the like will never happen again.

This man Scott testified, among other things, as follows:

"He (Conley) positively denied on May 18th that he had anything to do with the murder of Mary Phagan, or that he was at the factory at all. We talked very strongly to him and tried to make him give a confession. We used a little profanity and cussed him. He made that statement after he knew that I knew he could write. We had him for about two or three hours that day. He made another statement on May 24th which was put in writing (Defendant's Exhibit No. 27). He was carried to Mr. Dorsey's office that day and went over the statement with Mr. Dorsey. He still denied that he had seen the little girl the day of the murder. He swore to all that the statement contained; that statement was a voluntary statement from him. He sent for Mr. Black and we went over it together. We questioned him again very closely for about three hours on May 25th. He repeated the story that he told in his statement of May 24th. We saw him again on May 27th in Chief Lanford's office. Talked to him about five or six hours. We tried to impress upon him the fact that Frank would not have written those notes on Friday. That that was not a reasonable story. That showed premeditation and that would not do. We pointed out to him why the first statement would not fit. We told him we wanted another statement. He declined to make another statement. He said he had told the truth. On May 28th Chief Langford and I grilled him for five or six hours trying to make clear several points which were far fetched in his statement. We pointed out to him that his statement would not do, and would not fit. He then made us another long statement on May 28th, (Defendant's Exhibit No. 38) having been told that his previous statement showed deliberation and that that could not be accepted. He told us all that appears in the statement of May 28th. He never told us anything about Frank making any engagement for him to stamp for him and for him to

lock the door. He told us nothing about seeing Monteen Stover. He did not tell us about seeing Mary Phagan. He said he did not see her. He did not say he saw Lemmie Quinn. On May 29th we had another talk with him (Conley). Talked with him almost all day. Yes, we pointed out things in his story that were improbable and told him that he must do better than that. Anything in his story that looked to be out of place we told him would not do. After he had made his last statement we did not wish to make any further suggestion to him at that time. He then made his last statement on May 29th (Defendant's Exhibit No. 39). He told us all that appears in that statement. We tried to get him to tell about the little mesh bag. We tried pretty strong. He always denied ever having seen it. He never said that he saw it in Frank's office, or that Frank had it in his safe. We asked him about the parasol. He did not tell us anything about it. He did not tell us anything about Frank stumbling on the street floor as he got off the elevator and hit him. Since making this statement to us on May 29th I have not communicated with Conley and have not seen him."

In the midst of this grilling which has been so graphically outlined by Scott, supra, Conley made three other statements. The one of May 24th, 1913 (page 282, Brief of Evidence); the one of May 28th, 1913 (page 283, Brief of Evidence); and the one of May 29th, 1913 (page 289, Brief of Evidence).

If the Court will even casually read these statements it will readily be seen that this grilling did not fail to bear fruit. The one of May 24th would not do because it showed premeditation upon Frank's part. Scott called this to Conley's attention, and he proceeded to correct it in his next statement. In that statement he had insisted that the murder notes were written on Friday at Frank's dictation. This is one of the things that would not fit in, and Scott urged him to do better. And he undertook to do better on May 28th. That statement was to be his last; the police thought that they would need no other; and in making it for Conley, they let him assert in the strongest terms why

there was a necessity for making a new statement, and that that statement was to conclude the matter, containing therein all the truth:

> "I make this statement, my second statement in regard to the murder of Mary Phagan at the National Pencil Factory. In my first statement I made the statement that I went to the Pencil Factory on Friday, April 25th, and went to Mr. Frank's office at four minutes to one o'clock. I made this statement in regard to Friday in order that I might not be accused of knowing anything of this murder, because I thought if I put myself there on Saturday they might accuse me of having a hand in it, and I now make my second and last statement regarding the matter freely and voluntarily, after thinking over the situation, and I have made up my mind to tell the whole truth, and I make it freely and voluntarily without the promise of any reward or from force or fear of punishment in any way."

As might have been expected, this statement is a muddle of inconceivable nonsense. It bears upon its face no indicia of that spontaneity that comes from the truth. It shows upon its face that it was not an outline of a series of facts and circumstances as they actually had existed, but that it is an artificial jumble and patchwork brought into existence by this negro in an effort to meet the training given him by Scott and others.

But this statement, although it was to be his last statement and contained all the truth, did not come up to the measure which Scott had set for him. He had not met all the inconsistencies that the police had discovered. He had not strongly enough connected Frank with the dead body of Mary Phagan. Indeed, in this statement, to be his last, he made no statement of having seen Mary Phagan dead or alive upon that day.

Hence another statement was necessary to meet the theories of Scott and others, and it was produced on May 29th. This last statement is not only full of inherent disparities, but it, as is to be expected, contradicts in vital particulars,

the other statements made, but it went as far as Scott thought it necessary to go. It introduced the dead body of Mary Phagan, and if believed, fixed upon Frank the guilt of her murder.

When Scott and Black cultivated this negro to the point where he could and did make this latter statement, they felt that their work was done. And from thence on their services were dispensed with, and other officers—Starnes and Campbell—took up the task of grilling Conley.

How well they did can be seen from Conley's testimony:

> "I told the detectives about (Frank) wanting me to watch for him when I went back to the factory. I don't know why I didn't tell that at the time. I told them about moving the body. Don't remember who I told it to, or when, but I told it. I did tell them about Mr. Frank stomping his foot. I don't know whether I told them at the time I told about helping move the body. I told it to Mr. Scott, Mr. Black, Mr. Campbell, Mr. Starnes and Mr. Dorsey. Mr. Starnes and Mr. Campbell wasn't in there sometimes when I told it. No. I didn't tell it to Mr. Scott and Mr. Black. They dropped the case and Mr. Starnes and Mr. Campbell taken it up. They came down and was talking to me for a month or more in my cell." Page 68 Brief of Evidence.
>
> "Yes, I told Mr. Scott and Mr. Black that the only people who went up at all were Miss Mattie Smith, Darley, Holloway and the woman in green, and nobody went up and down until Mr. Frank whistled. No, that wasn't true. The reason why I told that story was because I didn't want them to know that these other people passed by me, for they might accuse me. The reason why I didn't tell them was because I didn't want people to think that I was the one that done the murder. I told them that I saw those four men go up because I didn't think they saw me sitting there, and I didn't tell of seeing the other people for fear they would report on me. The reason why I told the police about those four going up there, because that is all I could remember that went up and down. I don't know when my memory got fresher about other people going up and down. I think it was after I got

> out of jail. I think I corrected that with Mr. Starnes, Mr. Campbell and Dr. Dorsey, at police headquarters. After I corrected with the detectives down at headquarters, they took me to Mr. Dorsey's office. I have been in Mr. Dorsey's office three times. Mr. Dorsey was down at headquarters with me I think about four times. As to whether it took Mr. Dorsey about seven times to get my testimony straight, it didn't take him that long to get it straight, it took that long for me. As to why I didn't tell it all, I didn't want to tell it all. I was intending to hold back some. I didn't want to tell it all right at one time. I just told a little and kept back a little. Yes, and Mr. Dorsey went down seven times while I was telling some and holding back some. They didn't ask me to take back any stories. No, it didn't take Mr. Dorsey seven times to tell the story. Yes, I said I added to it every time he went down."

The result of this month's talk between Starnes, Campbell and Conley bore just such fruit as might have been expected. His last statement, which Scott and Black had secured, was practically deserted when he came to testify at the trial, and new, startling, contradictory and incredible statements were made, never before hinted at. As shown, supra, he stated in his statement of May 28th that it was to be his last, final and full statement. He explained and testified to his additional statement of May 29th as follows:

> "The reason I haven't told this before is I thought Mr. Frank would get out and help me out, but it seems that he is not going to get out and I have decided to tell the whole truth about this matter."

On the trial, he made no effort to explain the contradictions in his various statements, nor how it was that having determined to tell the whole truth on Frank that he reserved the startling, sensational facts, contradictory of all his other statements, until the final trial.

Conley's testimony occupies twenty-one pages of the brief

of evidence—pages 52 to 71 inclusive. We submit that no more remarkable testimony ever found its way into the record of any court. In it he admits hundreds of times that he lied, apparently without reason and without purpose; lied innumerable times before the trial and many times in the midst of the trial. It is monstrous that the testimony of this many times self-convicted liar should be made the basis of the execution of any human being.

Never until the trial did he let out a single suggestion charging Frank with improper conduct with women, or perversion on his part. With all the grilling that Black and Scott gave him, he never intimated to them Frank's alleged perversion, nor his alleged dealing with other women. He made his last and truthful statement on May 28th, and on May 29th seeing that Frank was not coming to his aid he "decided to tell the whole truth about the matter." And yet, this miserable pretense of perversion was not heard of from Conley until the actual trial begun.

He added to his statement up to the very last moment of the trial. For, after having been on the stand for days he was put back and added to his statement that he saw Frank conceal the mesh bag of the little girl. Who suggested this belated statement will, perhaps, never be known, but whether it was suggested to, or originated with Conley, it had no existence until the main examination, direct and cross, had ended.

It is not supposed that this Court can be made a jury; but an understanding of the facts of the original case is absolutely necessary.

It is undisputed that this negro man, the main witness for the State, was impeached:

(a) By proof of bad character;

(b) By a long criminal record;

(c) By innumerable contradicting statements before, and during, the trial;

(d) By his sworn confession that he was father of many lies.

Under sane surroundings, no jury would have believed this witness, unless he was overwhelmingly supported by the undisputed facts and circumstances of the case.

Whether so supported, and to what extent, depends upon the man he was and the tale he told.

WAS CONLEY SUPPORTED IN THE STORY HE TOLD?

It is not disputed that in isolated, immaterial matters Conley's story was supported by other witnesses and Frank's statement. Such support was inevitable, and must have existed wholly apart from the question of Frank's guilt.

But in the vital, material matters—matters pointing to the fixing of Frank's guilt, not a single witness on the original trial supported his story.

In his main recitals, his absurdities and contradicting statements were so glaring as to preclude the possibility of support.

It was, however, vehemently contended by the State that Conley was supported by two physical facts:

(a) That the girl's blood was found on the second floor of the factory; and

(b) **That her hair was found on a lathe on the same floor.**

The conclusion is inevitable that, if the murder did not occur on the second floor, Frank was not guilty. The converse of this proposition, however, is not necessarily true. The murder might have occurred on the second floor, and the negro Conley, and not Frank be the murderer. Those two facts might be true, without in any way touching Frank, unless the balance of Conley's wild story was true.

Let that be as it may, we are very clear that facts did not exist and, therefore, could not corroborate.

A

EVIDENCE AS TO ALLEGED BLOOD SPOTS.

Conley swore that he found the girl dead at the back of the second floor of the factory with a serious gash in the skull, from which it is undisputed that blood must have flown in profusion. Recognizing the importance of that fact, the State sought to prove that there was a smear of blood in front of the ladies' closet covering a span of four to six inches in diameter. It was conceded there was no sign of blood where the girl was found, lately killed.

Conley claims that he carried her, her head not covered, about seventy-five feet to the ladies' closet. Between the point of discovery and the closet, there was not a drop of blood.

To account for the blood at the closet, he says that he there dropped the body. After dropping the body, he then carried it, with its head uncovered, about seventy-five feet to the elevator. Between the elevator and the closet there was not a drop of blood. The body, the head uncovered, was placed on the elevator floor and carried to the cellar. On the elevator there was no trace of blood. The body was carried on Conley's shoulder to the back of the cellar and placed upon a pile of sawdust. Neither on Conley's clothes, nor on the floor of the cellar, was there any trace of blood, except under the pile of sawdust immediately under the little girl's head. If the stain before the closet was not blood, then there was on the second floor not one drop of blood.

It is well understood that the only sure test for blood is a chemical one. Give the chemist substance supposed to be blood, and he can answer certainly, blood or no blood.

The State recognized that fact and chipped up, in five or six chips, the surface of the floor upon which was the red stains claimed to be blood, and submitted all those chips to Dr. Claude Smith, a chemist, certainly not favorably to

Frank. After he analyzed the stains, he reported no blood on either of the chips, except that on only one of the chips he discovered a trace of some sort of blood, four or five corpuscles to the field. How infinitely small was such a trace, can be readily comprehended when it is borne in mind that there are 80,000 corpuscles to the drop of blood.

The result of this analysis is conclusive. The red stain seen by the various witnesses was not blood. A number of witnesses thought it was, because it looked like blood. An equal number thought it was not blood, because it looked like red stains and not like blood which was scattered generally on the factory floor. But the chemist with scientific certainty, settled the matter. **The stain was smeared over the whole surface of the chips, and had it been blood, then blood would have been discovered in profusion on all the chips.**

The chemist, Dr. Claude Smith, testified as follows:

> "I found dirt and stain on all the chips; I could not tell the one I found blood on. I did the work in the ordinary way. The whole surface of the chips was coated with dirt. I could not tell whether the blood-stain was fresh or old. I have kept blood corpuscles in the laboratory for several years. I found probably three or four or five blood corpuscles to the field. I do not know how much blood there was, a drop, or a half a drop we could call it, or less than that."

Dr. Smith only knew that the 3, 4, or 5 corpuscles found were blood. He did not even know that it was human blood. **He did know that the stain, which attracted the eyes of the witnesses was not blood, for all the chips were stained alike and only on one of them was there traces of blood.**

The trace found was easily to be accounted for otherwise than as having come from Mary Phagan.

The floor of the metal-room had neither been scoured or washed for years; it was dirty, greasy, and covered with red paint. (Quinn, brief of evidence, p. 106; Holliway, brief of evidence, p. 30; Schiff, brief of evidence, p. 86; Greenfield, brief of evidence, p. 143; Darley, brief of evidence, pp. 33-35; Hennedy, brief of evidence,

Frequent accidents had happened to employees of the factory. In the fall of 1912, two men were badly hurt in the metal-room, and the blood from their wounds was scattered right over the place where the blood stains were found. (Brief of evidence, Quinn, p. 105; Lee, 133; Montag, 129.)

It was likewise in evidence, without dispute that menstrual spots frequently appeared around dressing-rooms in factories where a large number of women worked, and that it was not unusual to find blood spots near the entrance to the womans' dressing-room, just about where the blood stains were said to have been found.

The witness Hollaway testified:

> "At the ladies' dressing-room, right where they chipped up the spots, right over there is the toilet, not over six feet from it. I have seen blood-spots frequently there ever since I have been working there. The foreladies would always tell me about it, and I have often noticed it when we were working or sweeping, or anything of the kind, and I would know what it meant. I would go back and have it cleaned."

Miss E. M. Carson testified on the same subject:

> "I have seen blood-spots around the dressing room three or four times. * * * I have seen blood in the dressing-room, around the lockers, and some around the mirror. I have seen girls up there mash their fingers on machines. I have seen blood in the sink in the toilet-room and on the machines where they cut their fingers. * * * I have seen girls, once or twice, go into the toilet-room, after they had mashed their fing-

ers. * * * The big spots of blood I was talking about was occasioned by the girls whose sickness was on them." Brief of Evidence, p. 119.

The witness Darley testified on the same subject:

"We see spots all over the factory floor. We have varnish spots, and people cut their fingers. We have every color of spots you can think of. I have been working in factories for twenty-four years. It is a frequent occurrence in factories where ladies work that you will see large spots in dressing-rooms. I have seen them a good many times. I have seen it at this factory."

This stain was not so marked as to readily attract attention. Chief Langford, Detectives Starnes and Black, and others, made a careful examination of the floor of the factory on Sunday, and they did not discover the blood stains referred to. It was not until Monday that Barret claimed to have discovered it, and the number of witnesses as to the result of this discovery closely examined the stain.

It is the net result of this blood evidence that the stain observed by the various witnesses was not blood stain at all. There was, however, mixed with or under a small part of this stain, minute particles of blood. It is clear that these particles of blood did not reach the surface of the floor by reason of Mary Phagan's head striking the floor in a fall from the shoulders of Jim Conley. Evidently such a fall would have scattered the blood from Mary's head so as to stain even a larger surface than the stained surface found by Barrett; and, had the stain come from Mary Phagan's head, Chemist Smith would have undoubtedly found it over the surface of all the chips submitted to him for analysis.

How it did get there, conceding as we must that it did not come from the head of Mary Phagan, is unimportant. If important, the evidence abundantly explains how it most probably got there. It may have gotten there several ways. It could not have gotten there from the head of Mary Phagan.

B

EVIDENCE AS TO ALLEGED HAIR OF MARY PHAGAN

The other physical fact proclaimed by the State to support Conley, was the finding of certain strands of hair Monday morning on a lathe by the man Barrett. The State showed by Barrett that, on Monday morning, after the murder, on a certain lathe about thirty or forty feet from the place where Conley claimed to find the body of Mary Phagan, he found six or eight strands of hair. Barrett's testimony, as to that subject, was as follows:

> "I found some hair on the handle of a bench lathe. The handle was in the shape of an "L." The hair was hanging on the handle, swinging down. Mell Stanford saw this hair. The hair was not there on Friday. The gas jet that the girls sometimes used to curl their hair was about ten feet from the machine where the hair was found. * * * I knew the hair was not there on Friday, because I used the machine up to quitting time at five-thirty (5:30). * * * I found the hair some few minutes after; about six or eight strands of hair, and pretty long. When I left the machine on Friday, I left a piece of work in there. When I got back, the piece of work was still there; it had not been disturbed. The machine was in the same position which I left it Friday night. There was no blood under this machine." Brief of Evidence, p. 27.

Darley testified to the hair, as follows:

> "Barrett showed me some hair on the handle of the lathe. It was twenty or thirty feet from Mary Phagan's machine on the north side of the room. There was no blood-spot on it. I don't think anybody could answer how many strands of hair Barrett found wound around the lever. I don't think there was over six or eight at the outside. It was pretty hard to tell the color."

The witness Quinn testified, as follows:

> "I could not tell what color of hair it was that Barrett found. There was only a half dozen strands in it.

> Chief Lanford took it. There is a place in the room where the girls dress their hair by a little gas-jet, which they use for heating a curling iron. It was about ten feet from the lathe where Barrett claimed to have found the hair. If a breeze was blowing from this window to the west, it would blow to where the girls were fixing their hair." Brief of Evidence, p. 106.

Upon cross-examination, Magnolia Kennedy testified:

> "On Monday, April 28th, Mr. Barrett called my attention to the hair which he found on the machine. It looked like Mary's hair. My machine was right next to Mary. * * * Mary's hair was a light brown—kind of a sandy color. * * * I do not know whose hair that was."

The hair found by Barrett was turned over to the State, but was never introduced in evidence. The defendant had no access to it. Neither he, nor his counsel, ever saw it. Indeed, it was their understanding that it had been lost long before the trial. The state strongly pressed upon the jury that the testimony as to the hair (the whole of which is above outlined) strongly supported the story of Conley. His argument to the jury was taken down by the Court Reporter, and four times he urged this contention upon the jury. The solicitor's first comment was as follows:

> "Barrett," "Christopher Columbus Barrett," if you will, that discovered the hair that was identified, I believe, by Magnolia Kennedy Monday morning, as soon as they began work."

Again he refers to the hair as follows:

> "Barrett, the man who discovered the hair on his machine early in the morning."

Again he alluded to Barrett, as follows:

> "I say to you that this man Barrett stands as an oasis in a mighty desert, standing up for truth. * * that Barrett when he swore that he found blood there

at the place where Conley said he dropped the body, told the truth; and when he said he found that hair on the machine."

Again he alluded to him, as follows:

"That Mr. Barrett, of the metal department, had claimed he had found blood-spots and where he had found some hair."

In his brief filed in the Supreme Court, Mr. Dorsey made the following reference to Barrett's evidence and the importance of the hair:

"FIRST: HAIR.

"E. F. Barrett, (p. 42) was a machinist for the National Pencil Company. He says: 'On Monday morning, April 28th * * between six thirty and seven o'clock * * * I found some hair on the handle of a bench lathe. * * * The hair was hanging on the handle, swinging down. Mell Stanford saw the hair. The hair was not there Friday.'

"Counsel for the defendant tried to make it appear that the girls sometimes curled their hair about where Barrett found this hair, but as to this Barrett says: 'The gas-jet that the girls sometimes used to curl their hair on is about ten feet from the machine where the hair was found. * * * I know.' He says: 'The hair wasn't there on Friday, for I had used that machine up to quitting time—5:30.'

"Mary Phagan, it will be remembered, was not there Friday.

"Darley, at the beginning of his cross-examination, says 'Barrett showed me some hair on the lever of the lathe. It was twenty or thirty feet from Mary Phagan's machine on the north side of the room. They were wound around the lever. I don't think there was over six or eight at the outside.'

"Miss Magnolia Kennedy, a witness for the defendant, corroborated Barrett when she says (p. 168): 'On Monday, April 28th, Mr. Barrett called my attention

to the hair which he found on the machine. It looked like Mary's hair. Mary's hair was a light brown, kind of sandy color.'

"This hair and blood-spots, to be discussed hereafter, were found by Barrett early Monday morning and before any rewards had been offered.

"The location of the machine where the hair was found can be readily seen by reference to the State's exhibit A, No. 10 (p. 372), and in connection with this State's exhibit A, we will remark here that the photograph is from a newspaper cut, we presume, but certainly it is not from the exhibit which the State really had in court. It does not correspond in several particulars to the one used in court, but the location of the machine on which the hair was found is accurate."

Thus, it will be seen that this hair played an important part in the case. The State could not deny, as the original records will abundantly show, that Conley had been impeached in every way known to the law; by general proof of bad character; by contradictory statements made under oath; by long criminal career; and by his own admission as to numberless lies. The record fairly bristled with his perjury.

From the ruin of this overwhelming impeachment, the State sought to save Conley by showing corroboration, and the finding of this hair was time and again impressed upon the jury as corroboration powerful enough to save Conley in spite of his bad character, in spite of his criminal career, in spite of his many contradictions in and out of court, and in spite of the multitude of lies with which his testimony bristled.

NEWLY DISCOVERED EVIDENCE OF DR. HARRIS.

There had been an autopsy of Mary Phagan's body, at the instance of the Solicitor and under the supervision of Dr. Harris. Neither the defendant, nor his counsel, knew of the autopsy until after it had been made. **The result of**

the autopsy, at the request of the Solicitor-General, was kept a secret by Dr. Harris. The defense did not know, nor could they discover, what the examination made by Dr. Harris disclosed, nor what was the claimed result of the investigation.

Oscar Pappenheimer, a stockholder in the National Pencil Company and an intimate friend of Dr. Harris, before the trial, at the home of Dr. Harris, asked Dr. Harris: "Whether, if consistent with his duty, he could tell the witness what he learned as a result of his investigation and examination of the body of Mary Phagan." In response to this inquiry, Dr. Harris stated that he felt he was bound not to discuss the matter, and thereupon the subject was temporarily dropped. Shortly thereafter, however, Dr. Harris said: "I can say this to you, Mr. Pappenheimer, that what I found during the examination is of no importance whatever, and need give you no bother".

Dr. Harris appeared as a witness twice during the trial. Upon his first appearance, he testified as to the examination of the organs of the stomach, etc., but, before finishing his examination, he was taken sick and excused by the Court until a later day.

During this interval, and before his re-appearance as a witness, L. Z. Rosser and R. R. Arnold called upon Dr. Harris and urged him to tell just what he did discover from the autopsy of Mary Phagan and just what facts he knew about which he was willing to testify. Dr. Harris declined to give this information, stating that he promised the solicitor to keep the matter a secret. They urged him frankly to tell all he knew, and stated that he was a public official of the State; that he had been employed by the County and paid with the money of all the tax-payers; and that, under the circumstances, he could not afford to conceal anything.

This argument had no effect with Dr. Harris, and he declined to give any information, **but did say that he would state fully and frankly all he knew when he was on the stand.**

After this interview, when Dr. Harris was again upon the stand, he was asked questions in reference to his examination of Mary Phagan's body, as follows:

Q. "What did he (Mr. Dorsey) tell you to examine? What parts of the body did he tell you to examine?"

A. "He said he wanted me to examine the case and tell him all I could do about it."

Q. "What had you in mind; what were you seeking to determine by the autopsy; what did you understand you were seeking?"

A. "There were some suggestions of poison at the time when I went out there, but I saw at once there was no reason for assuming that. I failed to state on my direct examination that the stomach contents were tested for alkaloid poison and there was none present. Of course, I dismissed that from my mind. As soon as I saw the girl, I saw it was a matter of strangulation."

From these questions and answers, it is evident that Dr. Harris evaded the questions asked him and, whether intending to do so or not, led the defense to believe that he had examined only the organs about which he had testified, never mentioning having taken hair from the head of Mary Phagan and not even suggesting that he had made a microscopic comparison between the hair of Mary Phagan and the hair found on the lathe.

As suggested above, the defendant, nor his counsel, had access to the hair found upon the lathe. It had been in the keeping of the State. Diligent inquiry was made of practically all the employees of the factory, seeking someone who had seen and knew the color of the hair of Mary Phagan sufficiently well to make a comparison one way or the other. No such witness was discovered prior to the trial. Darley, Quinn and Barrett saw the hair, but could give no light as to whose hair it was, nor how it compared with

Mary Phagan's hair. Magnolia Kennedy swore that the hair looked like Mary Phagan's, but her last statement on the stand was: "I do not know whose hair it was".

Long after the trial, and after its affirmance by this Court, a remarkable state of affairs with reference to this hair and Dr. Harris was discovered. When the autopsy was had, Dr. Harris obtained a specimen of Mary Phagan's hair, with close proximity to the injury on her head, his purpose being to microscopically compare the hair taken from the head of Mary Phagan with the hair found upon the lathe. He took her hair and the hair found on the lathe and made a microscopic examination and comparison of them; and, after thus examining them, made a report to the Solicitor. When this examination by Dr. Harris became known, Mr. Harlee Branch interviewed Dr. Harris, and the testimony of Mr. Branch, set out in the bill of exceptions, was as follows:

"On February 20, 1914, I interviewed Dr. H. F. Harris with reference to his examination of certain hair said to have been found on a lathe at the National Pencil Company by one Barrett. Dr. Harris admitted having performed the autopsy on the body of Mary Phagan and stated that, under the directions of Solicitor Dorsey, he obtained some of the girl's hair when the body was exhumed in order to compare it with the hair found on the lathe. He stated that the specimens of hair taken from the head, when compared with the specimens found on the lathe, were widely different and were not from the head of the same girl. He stated that he examined both samples of hair under the microscope; that the hair taken from the lathe was not of the same shade, texture or shape as that taken by him from Mary Phagan's head. HE STATED THAT HE REPORTED THIS FACT TO THE SOLICITOR-GENERAL, AND THAT THE LATTER TOLD HIM THERE WOULD BE NO NECESSITY OF GOING ANY FURTHER WITH THE HAIR INVESTIGATION. He further stated that he had never considered the matter as a very material one and dismissed it from his mind;

that the samples of hair, with the exception of the microscopic sections, were turned back to the Solicitor-General and that he (Dr. Harris) now had the latter somewhere in his laboratory. He said that when he notified the Solicitor that the two specimens of hair were not the same, the Solicitor simply remarked THAT HE WOULD LET THE MATTER END THERE. Dr. Harris was quite positive in his assertions that the microscopic test was an accurate one. Dr. Harris said that the microscope would show the shade, texture and shape, and that the hair of different persons differed in these particulars. He explained how the shape was examined under the microscope, showing that the end sections of the hair were looked at and that it would show if it was circular or any other shape."

William M. Smith, after testifying in detail about his presence in the Health Department at the State Capitol, whereat Dr. Harris, the Solicitor-General and his brother, Dr. Dorsey, were present, testified on the extraordinary motion for new trial, as follows:

"He would not undertake to give the language of any one, not even the language he used himself upon that occasion. He did hear some discussion as to some hair, which to the best of his recollection, was that Dr. Harris had some of the hair that had been found on the lathe in the factory, possibly all of it, but he does not now recall about that however. He does not know whether or not it was mentioned as to how much of the hair Dr. Harris had. As well as he can recall, Dr. Harris said he had a number of sections. He thinks he said 'sections,' he might be mistaken about this, however, but that is his best recollection. The occasion for his making this statement was that he spoke to Dr. Dorsey about a comparison that he (Dr. Harris) had made of the hair taken from the lathe and some hair Dr. Harris had taken from the head of Mary Phagan. He told Dr. Dorsey that he had made a large number of sections and had compared them to try and find out whether or not the two hairs came from the same head, that is, the head of Mary Phagan. Dr. Harris told Dr. Dorsey that he had the sections there and that if Dr.

Dorsey desired, Dr. Harris is perfectly willing for him to also examine the sections of hair and compare them for himself. Dr. Dorsey stated that he did not care to examine the sections of the hair. Dr. Harris said that the comparison showed the hair not to be alike, but the details of these variants were not discussed in witness's presence. **It was stated, however, that it was the opinion of Dr. Harris from this comparison of hairs that the hair found on the lathe was not Mary Phagan's. His best recollection is that Dr. Harris so expressed himself, but he could not say positively."**

After the interview by Mr. Branch, the defendant through his counsel, sought to obtain an affidavit from Dr. Harris through one J. P. Fyffe and one G. A. K. Stevens. They presented to him an affidavit which he refused to sign, but with a pencil made certain alterations in the affidavit offered, and stated that, if these alterations were made, he would make the affidavit and swear to it, provided that one additional clause was added to it. **The affidavit which he said he would make, and which he said was the truth, is as follows:**

"Personally came before the undersigned, H. F. Harris, who, upon oath, says that he is a practicing physician. Affiant further says that he performed the autopsy on the body of Mary Phagan after it was exhumed, and that under the direction of Solicitor Dorsey, he obtained some of the girl's hair when the body was examined, to compare with the hair said to have been found on the lathe handle and which was given affiant by one of Mr. Dorsey's assistants.

Affiant states that the specimens taken from the head of the girl, when compared with the specimens given him, appeared somewhat different in color and on micropscopic examination, and his impression was **that the two specimens of hair were not from the head of the same person.**

Affiant states that he reported the foregoing view to the Solicitor-General, **and that the latter told him there would be no necessity for going any further with the hair investigation.**

Affiant further states that he never considered the matter in any way material and dismissed it from his mind. He further states that he does not recall that he was asked about the girl's hair when he was upon the witness stand, and states further that the samples of hair, with the exception of several microscopic sections, were turned back to the aforesaid assistant of the Solicitor-General.

Affiant further states that there was no purpose on his part to conceal the fact that the hair given him appeared different from the hair of Mary Phagan and that he does not think any one else had such a purpose.

Affiant states that he is quite positive in his assertions that the microscopic test was carefully made. He **states that the microscope will show the size and** shape of hair and that the hair of different persons differs in these particulars.

To this affidavit, Dr. Harris desired to add one other paragraph. The paragraph he wished to add is as follows:

> "Affiant further says the two specimens were so much alike that it was impossible for him to form any definite and absolute opinion as to whether they were from the head of the same person or not."

In giving his reason for wishing this additional statement to be added, he said: "It would not be necessary to add to my conclusions from the specimens under ordinary circumstances, or if I was dealing with gentlemen."

Fyffe and Stevens declined to accept the affidavit, supra, with the paragraphical conclusion which Dr. Harris insisted upon. As a result of such refusal, it became necessary to subpeona Dr. Harris, as a witness.

That examination was a most remarkable one. That the witness was evading the defendant, with all his energy and ingenuity, is perfectly apparent. His position, however charitably looked at, was at **least a doubtful** one. He had taken hair from Mary Phagan's head which was a close companion to the hair taken from the lathe, if indeed

the hair on the lathe was the hair of Mary Phagan. He had microscopically examined the two specimens of the hair for the purpose of determining whether they were from the same head. His purpose was a serious one, and it is not to be doubted but that he brought to its execution the very best of his scientific skill. The result of that examinaion, whether it satisfied him that the hair on the lathe was not that of Mary Phagan or whether it left him in doubt, did not relieve him of the embarrassment into which he had fallen.

If this scientific investigation left him in doubt, where can there be found an honest man who will question that **it was his duty to tell of the examination and its doubtful result?**

If he had said, on the stand, "I examined two specimens of hair with the best microscope to be purchased, with an honest effort and with my best skill, to determine if they came from the same or different heads, and I am still unable to say whether they did or not," can there be any doubt but that such a statement would have eliminated this hair question as a factor in the case? What jury with a spark of honesty would not have said that, if this expert, assisted by all the known science on the subject, can not tell whether these two specimens came from the same head, then surely the evidence of Magnolia Kennedy, who said it looked like Mary's hair, but did not know whose hair it was, was wholly worthless?

But Dr. Harris' testimony when fairly considered, and when taken in connection with his statement to Branch and with the affidavit he was willing to make to Fyffe and Stevens, does not show that his mind was equally balanced in judgment as to whether the two specimens did or did not come from the same head. Fairly construed, Dr. Harris' testimony shows that the new hair and the hair found on the lathe did not come from the same head. Let us see what he does say.

"The two specimens of hair resembled each other so much until it was impossible for me to say definitely that it was not Mary Phagan's hair. There appeared to be a slight difference in shade, and shape, but no difference in texture. The determination of the color had to be made by the naked eye, as these sections used for microscopic work are not suitable for such determination, and the amount of hair was not sufficiently great in amount for me to make an accurate estimate. (It will be borne in mind that all the hair found on the lathe was given to Dr. Harris.) * * * **Mr. Dorsey did not appear to attach any particular importance to this examination, nor did I at that time think it was of any importance whatsoever. Some days after having made the examination, the subject was** CASUALLY **mentioned by Mr. Dorsey in a conversation with me, and I told him at that time that it was my impression that the two sections of hair were different, though I was** CAREFUL **to say that there was no certainty as to this opinion, and I would not swear that they were different.** * * * I told Mr. Dorsey that it was my impression that the two specimens of hair were different. I said to him that the two specimens appeared to differ slightly in shape and possibly in color. I told him that the specimens brought me were not sufficient in amount to allow me to say very definitely as to its color. **I was under the impression that the two specimens of hair were different.** * * * I did not say specifically to Mr. Dorsey that the two specimens of hair were dissimilar; **I merely informed him that I gained the impression that they were not the same.** There was no question of proceeding further with the examination, as the only method likely to reveal anything had been employed already. * * * There was no more than a dozen strands of hair delivered to me from Mr. Dorsey's office, if that many. I took several hundred strands of hair from Mary Phagan's head, and I made an examination from about half the total number of hairs given me by Mr. Dorsey's assistant. The hairs used were cut into short pieces, several sections made at both ends and in the middle. I made similar microscopic sections from eight or ten hairs from Mary Phagan's head. **Taking both specimens together, I made an examination of between 100**

and 150 sections. These tests were made shortly after my examination of Mary Phagan's body."

Brush aside Dr. Harris' statement to Harlee Branch, which he does not deny, and the affidavit he offered to make for Fyffe and Stevens, which he declared to be true, and which he would sign if we added the paragraph, can there be any honest difference of opinion as to what effect Dr. Harris' testimony, given just as it is, would have upon a jury? No lawyer with a year's experience can doubt what would be the conclusions of the jury, after hearing this Harris testimony. Any jury with an ounce of integrity would have brushed aside the State's theory of corroboration of Conley by the hair.

Dr. Smith's analysis effectually disposed of the State's contention that Conley was corroborated by blood. Dr. Harris' testimony, if given to a jury will equally as effectually dispose of the contention that Conley was corroborated by the hair. The net result will be, in case of a new trial, to impeach Conley, and leave him standing without corroboration. Can it be said that, deprived of all corroboration, any honest mind would not disregard his testimony and bring a different verdict from the one originally given? This vacillation and doubt of Dr. Harris is, however, clearly assumed for the occasion and to buttress himself, if he can, in his present doubtful situation.

It may be true that hairs taken from different portions of the head may show slight dissimilarity, but it is a scientific fact so well understood that it may be said to be judicially known by the Court that hairs taken from the same portion of the head are practically identical and that no two hairs taken from different heads can deceive the skilled microscopist into the belief that they came from the same head.

While Dr. Harris changes his testimony considerably from the statement he made to Mr. Branch, as it appears

in the record, still his testimony as given before the commissioner, is sufficient to show that, after an examination, he came to the conclusion that the hair was not that of Mary Phagan, and he so reported to Mr. Dorsey.

Two experts, Professor Bachman and Professor Papez, were examined, and both testified that they had made a study of the subject of scalp hair, and the comparison of hair from different heads. Their testimony tended to show that, under the miscroscope, there could practically be a demonstration as to whether specimens of hair came from the same head. Their testimony further tended to show that it was only under the microscope that any opinion of value could be formed. The sum and substance of their evidence was that there were three points of comparison, which could be seen under the microscope, which would demonstrate whether hair came from the same head. We refer the Court to the evidence of these gentlemen as showing that the only evidence of any value as regards the identity of human hair, is the testimony of an expert examining under the microscope.

It is thus established in this case that prior to the trial in the court below, the State had had in its possession the identical hair found by Barrett; that it had had this hair scientifically examined by an expert; that this expert had reported to the solicitor, long before the trial, as a result of his examination, that the hair found by Barrett was not the hair of Mary Phagan; that this expert had promised the solicitor to keep his findings secret; that, in compliance with this promise of secrecy made to the solicitor, he not only refused to disclose his findings to defendant's counsel when they went to him, and so requested him before he testified, but that he dodged and evaded their questions while a witness on the stand under oath, and knowingly suppressed and deliberately concealed from the jury his findings as to the hair.

It is established that the solicitor in the trial court, avoid-

ed asking this expert any question as to his examination of the hair, but attempted to prove that the hair found by Barrett was Mary Phagan's hair by a non-expert witness who had never seen together, so as to allow a comparison, the hair found on the lathe and Mary Phagan's hair, but was only giving a wild conjecture based upon a recollection of the appearance of Mary Phagan's hair.

It is also established that the solicitor stated at the trial that the hair found on the lathe had been lost, and that he, although knowing that his expert, after a thorough microscopic examination, had reported the contrary to be his opinion, had nevertheless argued to the jury that the hair was the hair of Mary Phagan.

That this verdict against Frank was born in the midst of excitement, prejudice and passion, no one can doubt, who reads the certification of the Judge in the original motion for new trial. Evidently the State's earnest contention that the hair and the blood corroborated Conley was enough in the whirlwind of excitement that raged around the jury to cause them to accept Conley's statement, slimed as it was, with every matter of impeachment. Stripped of these two physical corroborations, can the calm, judicial mind doubt that an honest jury will probably disbelieve this perjured negro?

In an extraordinary motion for new trial, some good reason must be shown why the motion is not made during the term at which the verdict was rendered. In this particular, a perfect showing is here made. This whole transaction with reference to the microscopic examination of the hair was not only not divulged to the defendant's counsel, but was concealed from them, although they made an earnest application to Dr. Harris, himself, for all the information at his command. We meet fully all the technical rules, and it remains for this court to say whether the new testimony ought probably to result in a different verdict.

SUPPRESSION OF EVIDENCE.

In Cary vs. King, 5 Ga. 72, second headnote, this Court established the following principle:

> "A new trial will be granted for disingenuous attempts on the part of the prevailing party, to stifle or suppress evidence or to thwart the proceedings, or to obtain an unconscionable advantage. Upon this ground, a new trial was awarded where the defendant, by letters and persuasions, without the knowledge of the plaintiff, induced a witness to absent himself from the town in which he lived, and in which the Court was sitting on the day on which the cause was set down for trial, in order to prevent the plaintiff from proving a material fact, known to the witness, which he knew was material, and which he had reason to believe could be proven by no one but himself."

The facts of the case are as follows: An action was brought by the plaintiff against the defendants as endorsers upon a bill of exchange. The cause being ripe for trial, was set down for hearing and in consequence of the absence of one Barnard, the notary public who made demand and gave notice to the endorsers, the plaintiff was unable to make out his case and submitted to a nonsuit. A motion for a new trial was made by the plaintiff, and in support of the motion Barnard testified that one of the defendants had requested him to absent himself from town on the trial, which he agreed to do, though he was not subpoenaed, and that on the day of the trial he remained away until it was too late for him to testify. The new trial was refused by the lower court, but this court reversed the decision of the lower court and ordered a new trial. In the opinion, Nisbet J. delivering the opinion said:

> "The question is not whether the proper, or any steps were taken to secure the attendance of Mr. Barnard, nor whether he, in leaving the town of Columbus on the day when the trial was had, for the purpose of prevent-

ing the plaintiff from having the benefit of his testimony, violated any legal obligation or incurred any penalty. I express no opinion whether he, under the circumstances of the case, was guilty of contempt of court. I will say, however, that he acted with strange disregard to moral obligation and the duty of good citizenship, and with a no less strange misconception of what is due the authority of the Court and the majesty of the laws. Our Courts are organized to administer justice between man and man, and it is the duty of all good citizens to lend their aid to that administration—to sustain the rightful authority of their own Courts and preserve the fountain of justice pure. No man is in the full discharge of all the obligations of a good citizen when he, directly or indirectly, **prevents** the regular course of justice. So long as the law and administration of the law by the authority of the State duly constituted are sustained by a healthful public sentiment based upon the cordial co-operation and rightful conduct of individuals, the courts of justice will be found to fulfil the great ends of the civil and criminal admanistration. **But if the citizen is permitted to combine with parties to withhold testimony or in any other way to disturb the course of justice and to prevent the trial of causes upon their merits, the Courts will become a mockery and a farce.** * * * He, therefore, lends himself to one party in order to defeat the other. Is not this an overt interference with the regular and impartial administration of the law? By his act the Court was prevented from trying the cause upon its merits. We do not call this a crime; we admit that he may have acted under a conviction that he was violating no obligation legal or moral, and that he had a perfect right to act as he did act, **but we think he acted under very imperfect views of duty."**

The facts of this case closely resemble the behavior of the witness Harris. He knew that the State was contending that the defendant committed the murder on the second floor of the factory, in the metal room, and that as proof, the deceased had been wounded in the head by falling against a lathe upon which certain strands of hair had

been found by the witness Barrett. He knew that the State, with all its power, was making an effort to corroborate the witness Conley by showing that the hair found on this lathe was the hair of Mary Phagan. His statement that he had "never considered the matter of any importance, whatsoever," is wholly disingenuous. If he had not considered it of "any importance whatever," why had he gone through the labor of preparing and examining, as he testified, between 100 and 150 cross sections of the hair? He knew that this hair, when compared with the hair of Mary Phagan, showed clearly its dissimilarity, showed clearly that it was not the hair of Mary Phagan. He knew that he had made this report to the Solicitor-General, and he knew and agreed with the Solicitor-General to conceal from the defendant, the defendant's counsel, the court and the jury the result of his scientific examination of this hair.

In the case of Cary vs. King, supra, the witness Barnard had not been subpoenaed and, therefore, was under no legal obligation to attend court and volunteer the information at his command. Yet the Court stated that Barnard knew his testimony, might be material, for he knew the character of the suit and what the plaintiff might want to prove by him, and he had reason to believe that he was the only person by whom notice could be proven. But the witness Harris can have no excuse for failing to divulge on the stand his examination of the hair, his conversation with the Solicitor. He was an expert witness, introduced by the State to give expert opinion, and the very basis of the introduction of expert evidence is its impartiality, its truthfulness in every sense of the word, and its freedom from concealment. **Certainly, in capital cases, an expert sworn in behalf of the State should not be guilty of any concealment or agreement with the State's representative to conceal from the defendant, the Court and the jury any fact which might tend to establish the defendant's innocence.**

We have shown how the witness Harris was questioned on

the stand, and how he evaded and concealed his findings as to the hair. We urge upon this court that in this concealment he violated his obligation as an expert witness to the harm of this defendant. It can not be seriously questioned that had the jury, the trial judge or this Court been advised as to the facts of the microscopic examination of the hair made by Dr. Harris, and the agreement between the witness Harris and the Solicitor-General to conceal this evidence, it would have had a powerful effect.

But the Court in the case of Cary, supra, did not stop in its opinion with a mere condemnation of the witness Barnard for violating his obligation as a citizen, though not subpoenaed, in concealing testimony vital to the defendant in said cause, but it took occasion **to then and there determine it to be the law of Georgia that, irrespective of any question of diligence, a new trial will be granted a party where his adversary has been guilty of concealing any testimony vital in the establishment of justice** in the cause between them. The Court stated:

"All this reasoning applies with intense force to the conduct of the defendants. They were parties before the Court, their rights were in the hands of the Court and equally the rights of the plaintiff to be determined by the Court according to the forms of law. The Court will not permit a party to interfere with those forms of law. It was the right of the plaintiff to prove the notice in this case. He had a right to prove it by Barnard if he could get him into court with or without the process of the Court. He had a right to expect that his adversary would resist his claim only according to the forms of law. The defendants had no right to resist it in any other way. * * * Indeed, it is the duty of the Court to see to it that its own authority be respected; that trials are conducted according to the forms of law, and that no advantage be taken by one party over the other. And, if by the improper conduct of one party, he gains an unfair or unconscionable advantage over his adversary, the Court will not permit him to retain it. The Courts of law, as well as of equity,

require that the parties shall come into Court with clean hands. They will not permit the sanctuary of the laws to be polluted. To the extent of their powers, the courts of law will grant relief against such advantage. They will grant it in cases like the present by awarding a new trial. These views are sustained by authority. In the first place, it is true as a general proposition that a new trial will be granted on account of the misbehavior of the prevailing party toward either juries or witnesses. 2 Tidd. 906, 7 Mod. 156; 3 Brod. & Bing, 272; 7 Moore, 87 S. C. If any artifice or trick be resorted to to PREVENT THE ATTENDANCE OF WITNESSES OR FOR THE SUPPRESSION OF EVIDENCE, A NEW TRIAL WILL BE GRANTED. Graham on New Trial, 54, and authorities there referred to. The conduct of the defendants in this instance may not be considered as amounting to artifice or trick strictly, but looks very much like it. There was something very much like artifice in importuning the witness to absent himself and entertaining him in a back room during the progress of the trial with refreshments.

"But a new trial will be granted for disingenuous attempts to stifle or suppress evidence or to thwart the proceedings or to obtain an unconscionable advantage. Graham on New Trials 56, and authorities there quoted; 1 Burrow, 352; 9 Price 76; 7 Wendell 63; Buller N. P. 328. Can it be doubted that the attempts of the defendant here were to stifle or to suppress the evidence? The attempt was to prevent the attendance of the witness in order to prevent him from testifying in behalf of the plaintiff. It was more than an attempt. It was a successful effort. * * * By their disingenuous conduct, they have obtained an unconscionable advantage over the plaintiff, and we are not willing that they shall retain it."

The principle enunciated in the Cary case, supra, demands a new trial for the defendant because of the suppression by the witness Harris and the Solicitor-General of the testimony relative to the hair. The concealment on the part of the State was not only the concealment of the testimony of the witness Harris, but also the testimony of

another witness, though a physical one—the hair itself. Can it be said that the Court, the jury, no less than the defendant, were fairly treated by this double concealment on the part of the State? Is it not true that with this improper conduct, in the language of the Cary case, supra, the Court will not permit a party to retain an advantage over his adversary, gained by improper conduct? Did the State come to trial with clean hands? Mr. Justice Nisbet says that "Courts of law, as well as of equity, require that the parties shall come into the trial with clean hands. They will not permit the sanctuary of the laws to be polluted and they will grant relief against such advantage."

There was not only the attempt on the part of the State to conceal the testimony of the witness Harris relative to this hair, but it was a successful effort. If this concealment was not intended, why the injunction of secrecy upon the witness Harris as to the result of his examination which, if scientifically accurate, could not be changed? Why the failure of the witness Harris to answer the questions propounded by defendant's counsel as to everything determined by his examination? Why did he not tell the "whole truth," as he had sworn to do? Why the command of the Solicitor-General to the witness Harris, when the report was made, that nothing further should be done in the investigation of the hair? Why the introduction by the State of other witnesses to prove that the hair was the hair of Mary Phagan, and the failure to introduce the scientific opinion of its expert that the hair found was not the hair of Mary Phagan? Can it be doubted that the suppression of this scientific opinion was a violation of the rights of this defendant, an interference with the orderly procedure of the courts, the obtaining by one party, and that the State, of an unconscionable advantage over one of its citizens on trial for his life? In the Cary case, supra, a judgment for the defendant in an action involving a debt was set aside, and a new trial was ordered by this Court be-

cause of improper conduct on the part of the defendant in suppressing testimony. Do not the facts of this case, a capital one, where the State itself, has been guilty of grosser misconduct, demand a new trial?

In Atlanta Consolidated Street Rwy. vs. Beauchamp, 93 Ga. 7, a new trial was ordered on the newly discovered evidence that plaintiff had received gunshot wounds and was afflicted with rheumatism ,and permanently disabled in his right arm, and the newly discovered evidence further tending to show that the injuries inflicted by the defendant were not so serious as the plaintiff had testified. The Court stated that the plaintiff could not consistently, with good faith, withhold and conceal these facts from the jury. On page 10 of the opinion, Lumpkin, J., says:

> **"The newly discovered evidence, if true, shows clearly that he had, before this time, been severely afflicted with rheumatism, and had also received a gunshot wound which permanently disabled his right arm. It also tends to show that the injuries the plaintiff had received at the hands of the defendant were by no means so serious as the plaintiff at the trial testified. We therefore feel constrained to order a new trial. It is certainly probable, if not absolutely certain, that in estimating the amount of damages to be awarded, the jury compared the physical condition of the plaintiff at the trial with that of a man in good health, with sound and vigorous limbs, unimpaired by disease or injuries of any kind, under the belief that plaintiff was such a man before he received the injuries sued for. Acting upon this belief, they doubtless allowed him a larger amount than they would have done had the facts brought to light by the newly discovered evidence been before them. Good faith and fair dealing forbade the plaintiff from withholding and concealing these facts from the jury. Under the circumstances stated, common honesty required a disclosure of the facts for their consideration. He had no right to pose before them as a man whom, formerly having a strong constitution, perfect health and sound limbs, had been by the defendant made a physical wreck, and thus obtain a recovery of**

an amount much larger than he was really entitled to receive. We do not by any means intimate that every plaintiff is, at all times and under all circumstances, under obligation to disclose facts which would injure his case; but in the case before us, the conduct of the plaintiff amounted to a tacit assertion, equivalent almost to actual swearing that he was a sound man until injured by the defendant. HE WAS SWORN AS A WITNESS IN HIS OWN BEHALF, AND HIS OATH REQUIRED HIM TO TELL 'THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH.' WE DO NOT THINK HE COMPLIED WITH ITS TERMS, HIS DELIBERATE SUPPRESSION OF MOST MATERIAL FACTS, IF NOT ALTOGETHER AS BAD AS ACTUAL FALSEHOOD, CERTAINLY WAS HARDLY LESS INJURIOUS TO THE DEFENDANT THAN IF HE HAD MADE FALSE STATEMENTS AS TO HIS PREVIOUS PHYSICAL CONDITION."

In Georgia, Southern & Fla. vs. Ransom, 5 Ga. App. 740, a new trial was granted on the ground of newly discovered evidence to the effect that the plaintiff was in nervous physical condition prior to the time of the injury complained of, which fact had been suppressed and concealed by her at the trial, Hill, C. J. said:

> **"Is it not probable that in allowing the amount which was awarded as damages, the jury acted in the belief that the plaintiff when she was maltreated, as she alleges, was a sound, healthy woman, free from every nervous trouble, and consequently awarded her a larger amount than they would have awarded if this newly discovered evidence had been before them. The evidence was not cumulative. It was material. We think the jury should have the benefit of this evidence, and we therefore award on this ground another trial. Citing Railway vs. Beauchamp, supra."**

In the case of Doyal v. State, 73 Ga. 72, the Court said in the third headnote:

> "3. But when the facts show that five respectable and disinterested witnesses of unimpeachable charac-

ter, resident in a county other than that of the venue of the crime and the trial, swear positively that one of the jury, which tried and convicted the prisoner and sentenced him to be hanged, told each of them beforehand that if he got on the jury, he would hang the accused, and when this statement was made, not to all at one time, which might have been under the influence of horror of the crime, and not made with deliberate ill-will, but to two, on one occasion, and to each of the others separately, at different times and on different occasions, and when the same juror afterwards said, in the hearing of others, that the City of Griffin was prosecuting the case, there was big money in it, and he could make a pile out of it; and when the same juror was induced by threats **of one of the counsel for the prosecution to swear to an affidavit exculpating himself** from having made the statements so testified to by these several respectable witnesses, being under charges of forgery and subornation of false swearing at Griffin, in Spalding County, and at Jonesboro, in Clayton County, disconnected with this murder case, by which threats he was induced to believe that his trial in Griffin would be prejudiced unless he so swore, and when his denial of the statements of said respectable witnesses was, in one affidavit he made, simply that he could not deny them positively, but had no recollection of them, and that denial, **induced by counsel,** was positive, and when due diligence was manifested by counsel in moving on these extraordinary grounds, and no time was lost in bringing the facts before the superior court so soon as discovered,

HELD, that conviction for murder and sentence of death on the verdict of a juror so utterly destitute of truth and uprightness of character, would shock the conscience of civilization, and soil the purity of jury trial; and no matter how heinous the crime committed, the preservation of that purity is of more consequence than the speedy punishment of any one man for any one offense, and public policy, as well as individual right, demand a new trial."

In the case of Fletcher v. People, 7 Northwestern Reporter, 80, decided by the Supreme Court of Illinois, the

facts showed a mortal combat between two Fletchers on the one hand and Steinbourne and Hope on the other. Hope was killed and Steinbourne so badly wounded it was thought he would die. He made what he believed to be a dying declaration by which it was shown that he and Hope had probably been the aggressors. However, he recovered and Fletcher was put on trial for the murder of Hope. Steinbourne took the stand and gave testimony indicating that the Fletchers had been the aggressors in the fight. The existence of the dying declaration was concealed from the defendant's counsel by the State. A conviction followed. Later, upon discovery of the dying declaration, the defendant moved for a new trial, which was granted by the Supreme Court. The Court said in part:

> "The affidavits showed that neither the defendants nor their attorneys had any knowledge of the existence of this statement until since the trial, when they accidentally learned of it; that they were guilty of no negligence in not having ascertained its existence; **that the statement, when made, was placed in the hands of the State's attorney of Kane County, and kept by him until his term of office expired, when he handed it over to his successor in office, who retained its possession, and did not disclose its existence to the defendants or their attorneys.** We think no negligence can in any respect be imputed to the defendants or their attorneys with regard to this statement."

DISCUSSION OF AUTHORITIES ON EXTRAORDINARY MOTIONS.

In the case of Malone vs. State, 49 Georgia, 221, the Court says that, in an extraordinary motion for new trial, such an extraordinary state of facts would be required as would probably produce a different result, if a new trial should be granted, and this state of facts must be unknown to defendant or his counsel at the time of the original motion, and impossible of ascertainment by the exercise of proper diligence.

The case of Cox vs. Hillyer, Judge, 65 Ga., p. 57, held that extraordinary motions or cases contemplated by the statute, are such as do not ordinarily occur in the transaction of human affairs, as when a man has been convicted of murder, and it afterwards appears that the supposed dead man is still alive, or where one is convicted on the testimony of a witness who is subsequently found guilty of perjury in giving that testimony, or where there has been some providential cause, and cases of like character.

In Puryear vs. State, 66 Georgia, 753, it was held that the mere discovery of cumulative evidence is not good ground for an extraordinary motion, but "to warrant such a motion, there would have to be some circumstance or event of unusual character, not ordinary in its nature, that delayed or prevented this discovery."

In the case of Doyle vs. State, 73 Georgia, 72, it was held that, in the case of an extraordinary motion, the grounds would be scanned closely and must be laid **in the very foundation of the purity of jury trial,** to authorize the grant of such an application."

The case of Jackson vs. Clark, 52 Georgia, 52, was held to present an extraordinary case, that being a case where the defendant was indicted as principal in the second degree, and was convicted upon the introduction in evidence of proof that the principal in the first degree was granted a new trial and acquitted. A motion for new trial was made by the accused, but his counsel abandoned his case. At the subsequent term of the court other counsel represented the accused and made the motion, and it was held that under these facts an extraordinary case was presented for the grant of a new trial.

"The newly discovered evidence in this case suggests such a doubt as to whether the prisoner's offense may not be voluntary manslaughter instead of murder, that, although not fully convinced that he is entitled to a new trial, under the strict rules of law, this court, in

the exercise of the discretion confided to it by statute, directs a new trial, in order that the prisoner may have his case examined in the light of all the evidence, by a jury, whose province it will be to look at the facts themselves, and not suffer the doubt above indicated to influence their finding, unless a like doubt shall arise in their own minds by reason of the evidence which shall come before them, nor unless it shall moreover seem to them to be a reasonable doubt."

Mathews v. State, 56 Ga. 469.

"According to many authorities, the newly discovered evidence, inasmuch as it applies to specific facts touching which there was no evidence at the trial, would be held not to be cumulative, although the new facts have no value except as tending to establish the same defence which was in question and touching which there was some evidence in behalf of the accused at the trial. Authorities to the contrary are numerous; but the conflict raises a serious doubt as to the true law. In view of this doubt, and because the newly discovered evidence would, if believed, by the jury, be morally certain to produce a verdict of acquittal, a new trial is ordered so that the accused may have the benefit of this evidence. Mathews v. The State, 56 Ga. 469."

Cooper v. The State, 91 Ga., 362.

"1. Although newly discovered evidence may tend to establish the truth of a material contention in direct support of which testimony was introduced at the trial, such evidence is not merely cumulative when it relates to a particular fact concerning which no witness had already testified. Thus, where in a criminal trial the defense was alibi, and the accused introduced witnesses who testified that on the day of the commission of the crime they saw the accused in a county other than that in which it was perpetrated, he being on that day, according to the testimony of some of them, at one place in the county to which their testimony related, and, according to the testimony of others of them, at other places therein, and, according to the testimony of all, too far from the scene of the of-

fense to have been possibly present at the time of its perpetration, newly discovered testimony of still another witness, which placed the accused, in the county where the other witnesses located him on the day in question, at a different hour and place from any testified to by them, is not merely cumulative, though it of course tended like the other testimony, to establish the truth of the defense of alibi.

"2. In a case of the nature above indicated, where at best the correctness of the verdict of guilty is to be most gravely doubted, and apparently there should have been a verdict of acquittal, a new trial should be granted upon such newly discovered evidence; for under such circumstances it is most probable that upon another trial that evidence would in connection with that which had been previously introduced, result in a verdict of not guilty."

Fellows v. The State, 114 Ga. 233.

In discussing this case, on page 237, Justice Lewis says: "It is true that many witnesses gave testimony going to establish the defense of alibi, but each of these witnesses swore to a different fact or set of facts from that offered to be proved by the testimony of Hitchcock. For many reasons, which need not be here discussed, a jury might believe Hitchcock when they would not believe any of the other witnesses who testified to the ultimate fact of alibi. This evidence was clearly material to the issue in the case, and, if believed, ought to result in the acquittal of the accused. This case, we think, is directly controlled by the decision of this court in Dale v. State, 88 Ga. 552. In that case, as in this, the defense relied on was alibi, and, incidentally to that defense, a question arose as to the identity of the accused, who was indicted for bigamy as J. O. H. Nutall alias W. R. Dale, but who claimed that he and Nutall were entirely different persons, and that he had never borne the name of Nutall. The accused was convicted, and he moved for a new trial on the ground, among others, of newly discovered evidence of witnesses who knew

Nutall in North Carolina, and who, by means of certain distinguishing characteristics, were able to swear that, while Dale and Nutall were very much alike, they were not one and the same man. On that point the same question was raised in the Dale case as in the case now under consideration, that the newly discovered evidence was merely cumulative of the evidence offered by the defense on the subject of alibi. In that case our present Chief Justice, who delivered the opinion of the court, used the following language (see page 561): "Cumulative evidence is defined to be 'additional evidence offered to establish a fact to which witnesses have already testified.'" It does not necessarily include all evidence which tends to establish the same ultimate or principally controverted fact. I Abbott, Law Dic. 331, and cases cited. Although the defendant's evidence as to alibi related to the same general question, to wit, that of identity, this newly discovered testimony, dealing as it it does with the comparative appearance and characteristics of Nutall and the defendant, is wholly different in its nature; and although there was other evidence on the latter subject, this testimony, especially that of Mrs. McCraney, as we have shown, relates to distinct facts as to which there was no evidence on the trial. It therefore can not be regarded as merely cumulative within the meaning of the law as to new trials."

In the case of Dale v. State, 88 Ga. 552, the case turned upon the identity of Dale. If Dale was Nutall he was guilty, otherwise not. Upon the trial a mass of testimony was introduced to settle this question of identity. After denial of a new trial had been affirmed by the Supreme Court, the extraordinary motion was made on the ground of the newly discovered testimony of Mrs. McCraney and J. H. Hale. Their testimony went also to the question of identity. In discussing the case on page 560, Justice Simmons says:

> "We think the ends of justice would be promoted by allowing the defendant an opportunity to avail himself

of this testimony. The case as presented to the jury was a very close one, and probably if this testimony had been before them the verdict would have been different. The conviction was based upon the testimony of persons who resided in North Carolina and had known Nutall as a resident of that State, but had lost sight of him for several years, and did not see him again until in this State they recognized the defendant as the same person. The defendant, to show that he was not Nutall, sought to establish an alibi, a number of witnesses, some of whom were very positive in their testimony, being introduced to show that the defendant did not reside in North Carolina during the period testified to by the State's witnesses, but during that time resided in this State, where he was not at any time known as Nutall. The testimony of these witnesses is controverted only as to the fact of identity. It is uncontradicted that they did know a person corresponding in appearance and other respects to the defendant, and known as Dale, who resided in Georgia at the time Nutall was shown to have resided in North Carolina, and that they were confident the defendant was the same person. In this condition of the evidence, the newly discovered testimony is calculated to throw additional light upon the case and might legitimately produce a reasonable doubt of the defendant's guilt. No lack of diligence appears on the part of the accused or his counsel in the procurement of evidence. It is not to be assumed that he knew anything of Nutall or his personal characteristics, so as to be able to direct attention to points of difference between Nutall and himself; and his situation as a prisoner or accused person, without the ability or the means, perhaps, to visit another State or to procure the attendance of witnesses beyond the process of the court, might well have rendered it impracticable to obtain evidence from persons who had known Nutall, that he was not the same person. As we have already said, this testimony is not merely cumulative. Cumulative evidence is defined to be "additional evidence offered to establish a fact to which witnesses have already testified." It does not necessarily include all evidence which tends to establish the same ultimate or principally controverted fact. 1 Abbott, Law. Dic.

331, and cases cited. Although the defendant's evidence as to alibi related to the same general question, to-wit, that of identity, this newly discovered testimony, dealing as it does with the comparative appearance and characteristics of Nutall and the defendant, is wholly different in its nature; and although there was other evidence on the latter subject, this testimony, especially that of Mrs. McCraney, as we have shown, relates to distinct facts as to which there was no evidence on the trial. It therefore can not be regarded as merely cumulative within the meaning of the rule as to new trials."

In the case of Thomas, alias Noisette, v. The State, 66 Ga. 514, on the original trial one witness testified that the defendant had struck Donovan with a hatchet, while two witnesses swore for the defendant, though having only seen part of the fuss they could not say who struck the blow. Afterwards a new trial was sought upon the ground of newly discovered evidence of two witnesses that they saw a third person strike the blow, and that the defendant did not strike at all. The new trial was denied and reversed by the Supreme Court.

This case is also material here on the question of diligence. On that question McCay, Judge, said:

"Nor do we think there is a want of diligence. The prisoner was arrested immediately, and has had no opportunity for inquiry. His brother, with whom he may be presumed to have had intercourse, was, as the affidavits show, himself the one who struck the blow. When counsel, assigned by the court, undertook to inquire into the facts, he was unable to get at the truth, the witnesses refusing to tell what they knew and misleading him by saying they knew nothing. They did wrong; but was the prisoner to blame for that? Could he know that, if put on the stand, they would testify as they say? He might well think they did not see the blow struck. Upon the whole we think the principles of justice require that there should be a new trial in this case."

In the case of Fletcher, and another v. People, 7 N. E. 80, discussed above, under another topic, the Supreme Court of Illinois held:

> "The general rule is that a new trial will not be granted merely for the purpose of admitting cumulative evidence, or to impeach a witness. But this rule is subject to exceptions—cumulative evidence of a different kind or character from that adduced on the trial. The new evidence of mitigating circumstances in this case (of indictment and conviction of murder) is held to be such as to be good ground for a new trial, and the record is held to show that the defendant used due diligence, and could not have obtained the evidence in time for the former trial."

This case has several matters in common with the case at bar. In a row between Ozias W. Fletcher and Merritt Fletcher upon the one side and Otto J. Hope and one Steinborne on the other, Hope was killed and Steinborne supposed to be fatally injured. While in this supposed condition he made a dying declaration in the shape of an affidavit, which was turned over to the State. Upon the trial Steinborne, having recovered, swore differently in some material particulars from the statements made in that affidavit. **The State concealed the existence of the affidavit from the defendant and the trial was ended without his knowledge of its existence.**

Thereafter it was discovered that this affidavit was in existence, and in the hands of the State. The Illinois Supreme Court on an extraordinary motion granted a new trial, upon the ground not that the affidavit would free Merritt Fletcher, but that it might form the basis for the infliction of a punishment other than death, by the jury.

In the case of Long v. The State, 54 Ga. 564, Long was prosecuted and convicted of robbery. A motion for new trial was made on the ground that the verdict was contrary to the evidence; without evidence to support it; contrary to

the law and that evidence had been discovered since the trial which would probably have changed the verdict. DeLong, the prosecutor, was the only witness for the State, and his evidence made out a case of robbery. One woman denied the robbery and other witnesses showed drunkeness on the part of DeLong and his association with women of ill repute. This court granted a new trial on the ground of newly discovered evidence, which consisted of the affidavits of two women that they saw Eva Sweatman (the woman present at the alleged robbery) in possession of DeLong's purse before the time of the alleged robbery, and that DeLong then said that she could have any amount of money she wanted. And the affidavit of two other women that they heard Eva Sweatman say she had enough money to buy a gallon of whiskey and saw her putting it in her stocking before the time of the alleged robbery. Also the affidavit of two policemen that DeLong told them after the alleged robbery that Eva Sweatman ran her hand in his pocket and took out his pocketbook which contained $26, and when she returned it $23 were missing.

In discussing the case Justice Jackson on page 566 says:

> "The affidavits of the policeman alone would not be sufficient to authorize a new trial on the ground of newly discovered testimony, as they consist only of contradictory statements of the prosecutor: 13 Georgia, 513; but they strengthen the motion predicated upon the other affidavits. Those affidavits are to facts and circumstances not cumulative, and which, if before the jury, might, and probably would, have changed the verdict. The defendant was arrested and confined the next day; no want of diligence appears on his part, nor on that of his counsel, under the facts disclosed in the record. The case made by the prosecutor was not a strong one for the high crime of robbery by force, for which the defendant has been sentenced to ten years in the penitentiary. The prosecutor was the only witness sworn for the State; he was drunk to the extent of staggering and throwing up

along the road and at the wagon yard on his return, therefore, taking the whole case together, we conclude that the ends of justice demand a new hearing, and we feel constrained to reverse the judgment and grant the new trial."

In the case of John W. Phillips vs. The State, 33 Ga. 281, the Supreme Court held:

> "The accused, who had heard before the trial of a witness whose testimony would be important to his defense, applied to such witness to learn what the witness would testify; the witness told him that he knew nothing; but after the trial and conviction, the accused learned the facts to which the witness would testify, and these being material, and such as would likely produce a different verdict: Held, that a new trial ought to have been granted, on the ground of newly discovered evidence."

In 14 Ency. Pldg. & Practice, page 797, the text says:

> "The discovery that a witness who was examined at the trial can testify to material facts omitted in his testimony, may constitute newly discovered evidence."

This involves the question of diligence which will be considered hereafter.

In Thomas, alias Noisette v. State, 52 Ga. 509, the court held:

"2. When there was a difficulty between a parcel of employees and their foreman, and a fuss or melee, and the defendant was immediately arrested and confined in jail until his trial, and his attorney, on inquiring of the persons present, was misled by their telling him they did not know what part defendant took in the fuss:

"Held, that when after the trial it was discovered that these witnesses do know and are ready to swear that the defendant did not do the principal act for which he was convicted, and that another did, it is no reply to a motion for a new trial that sufficient diligence had not been shown."

In the case of Anderson v. State, 21 A. M. Rep. 669, the Connecticut Court held:

> "A person was indicted for murder in the first degree and convicted notwithstanding there was some evidence tending to prove his insanity. Upon a petition for a new trial on the ground of newly-discovered evidence, tending further to establish insanity, HELD, that a new trial should be granted, and that even if the proof should not establish a total want of responsibility by reason of insanity, yet if it showed that the prisoner's mind was so far impaired as to render him incapable of a deliberate, premeditated murder, he should be convicted only of murder in the second degree."

14 Ency. Pleading & Practice, page 792, in dealing with the sufficiency of new evidence, the text is as follows:

> "The invariable rule is that, the newly-discovered evidence must be of such a character that it will probably change the result if a new trial is granted. In determining the sufficiency of the new evidence the court must weigh it with the evidence received at the trial. Usually the court must determine in advance the weight, credibility and probable effect of the new evidence, but in cases of conflicting evidence involving the credibility of numerous witnesses, the court will not assume the functions of a jury, but will grant a new trial. If it is clear the new evidence would have no effect on another trial the motion should be denied. But if it is doubtful as to how the new evidence would affect the result, the motion should be granted. " Machin v. Peoples St. R. R. etc. 45 No. App. 82.

The Supreme Court of New York has stated the doctrine thus:

> "What the effect of the testimony of these witnesses might be upon another trial of the action can not certainly now be determined. It presents a controverted case in which the jury might adopt either view. There is a probability, certainly, that they would consider the case of the plaintiff made out rather than that the de-

fense of the defendant was proved. And in this State of the evidence it will be a matter of propriety and justice to submit the case to the hearing and decision of another jury." Wilson Silver Plate Co. v. Barclay, 48 Hun. (N. Y.) 54.

This testimony of Dr. Harris is not merely cumulative. The rule as to cumulative evidence is thus stated by Greenleaf in his work on evidence (Vol. I, Sec. 2) as follows:

> "Cumulative evidence is evidence of the same kind to the same point. Thus, if a fact is attempted to be proved by the verbal demand of the party, evidence of another verbal demand of the same fact is cumulative, but evidence of other circumstances tending to establish the fact is not. The doctrine of all the cases is that cumulative evidence must be of the same kind as the evidence to which it is to be added. If of a different kind it is not cumulative. For instance negative testimony to a particular point is not the same kind of evidence as is positive evidence to the same point. This is illustrated in the case of Tyson v. State, 44 Pac. 610, in which the Kansas Supreme Court in discussing whether or not certain evidence was cumulative says:
>
> "It is falacious to say that Ford's evidence is cumulative to that of Henrietta. Her testimony was negative; that she was not there and did not know who was. Ford's evidence is positive. A man and woman were there but the man was not William Tyson and the woman was not Henrietta Tyson. If Ford had been a witness at the trial the result would probably have been different."

12 CYC. 740 in defining certain cumulative evidence says:

> "Cumulative evidence in connection with motions for a new trial may be defined as additional evidence of the same general character as the former evidence received at the trial to the same fact or point which was the subject of proof at the trial. If, however, the new evidence is of a different character and brings in new and independent facts it is not cumulative, although it may tend to prove a fact or ground of de-

fense which was proved, or attempted to be proved, at the trial."

In Words and Phrases, cumulative evidence is stated to be:

"Evidence to support the same point and which is of the same character with evidence already produced."

"Evidence of different and independent facts of different character, though it may tend to establish the same ground of defense, is not cumulative within the rule. Walker v. Graves, 20 Conn. 305; Barker v. French, 18 Vt. 460." See,

Casey v. State, 29 N. W. 265.

It is apparent that the testimony of Dr. Harris is not of the same kind as was the testimony of Barrett, Dalton and Quinn as to the existence of hair, and the testimony of Magnolia Kennedy that the hair looked like Mary Phagan's, though she did not know whose it was. They were not expert witnesses, but speaking only through their sense of sight. This new evidence of Dr. Harris is expert testimony, speaking through not only his sense of sight, but through his skill as a scientist, and through the microscope, which extends far beyond the capacity of the human eye. Expert testimony and testimony not expert, are clearly of different character, and recognized as such in all the books of evidence, governed and controlled by separate and distinct rules.

Finally, it can hardly be doubted, we think, the newly discovered evidence will strongly appeal to any jury, and that if so, the discussion of this court in the case of Carr v. The State, 106 Ga. 742 is decisive of the question. It clearly shows that a new trial should be granted on this ground:

"In the case of Thompson v. State, 60 Ga. 619, this court ruled that the newly discovered evidence, in view of the evidence had on a former trial, which might produce a different result, being material and not mere-

ly cumulative, was sufficient to authorize the grant of a new trial. In Dale v. State, 88 Ga. 552, this court ordered a new trial on the ground that the ends of justice would be promoted by allowing the defendant an opportunity to avail himself of the newly discovered evidence. And so we think here. The truth of the matter must necessarily be ascertained by the jury, either through the statement of the accused, or from the circumstances which convincingly show that statement to be untrue. It is an important case to the defendant, and one in which he is entitled to have the benefit of all accessible legal evidence; and it may be, that if this evidence had been before the jury, a different result would have been reached—at least, the jury, having this evidence before them, might have drawn more or less corroboration of the account given by the defendant immediately after the homicide, as well as his statement made at the trial. We do not go to the extent of saying that this evidence should or would have controlled the verdict. The value of it was for the jury. With it before them, they must still decide the truth of the issue. What we do say is, that the evidence appearing to be material and not merely cumulative, having been shown to be newly discovered, and without want of diligence in its discovery, a new trial should have been granted in order to allow the jury to pass on it in connection with the other evidence in the case, and to say, after due consideration of all the facts attendant, whether the defendant is or is not guilty."

GROUNDS 2, 3 AND 4.

In addition to the testimony of Dr. Harris considered supra, other newly discovered evidence set out in grounds 2, 3 and 4 of the present motion is pressed upon the court.

Miss Jimmie Mayfield (ground 2) testifies:

> "Mr. Barrett showed me the hair he said he had found on a lathe machine. It is my positive opinion that the hair was entirely too light in color to be that of Mary Phagan."

Mrs. Cora Falta (ground 3) testifies:

> "On Monday, April 28, I was at the National Pencil

Company factory and Magnolia Kennedy called my attention to the hair on a certain lathe machine that R. P. Barrett was alleged to have found there. At that time I gave it as my positive opinion that the hair on the machine was not that of Mary Phagan, as it was entirely too light in color to be the hair of said Mary Phagan. I now state that I am most positive that the hair I saw on the machine could not posibly have been Mary Phagan's hair, but that the hair on the machine was much lighter in color than the hair of Mary Phagan."

Alice Marjorie McCord (ground 4) testifies as follows:

"On the morning of Monday, April 28, 1913, my attention was called to some hair that was on a lathe machine on the second floor of the National Pencil Factory, and I examined said hair very closely. I knew Mary Phagan during her time of employment at the factory, and knew the color of her hair, and in my opinion the hair found on the lathe machine was not that of Mary Phagan, as it was much too light to be the hair of Mary Phagan."

Miss Cora Leffew testified (Bill of Exceptions, 65):

"I was well acquainted with the deceased Mary Phagan and with the color of her hair, and the hair above mentioned (that found on the lathe) was not the hair of Mary Phagan. It was entirely too light in color to have been from the head of the deceased.

Georgia Denham testified (Bill of Exceptions, 66):

"I was well acquainted with the deceased Mary Phagan and the color of her hair. The hair above mentioned was not the hair of Mary Phagan. It was entirely too light in color to have been from the head of the deceased Mary Phagan. Mary Phagan's hair was of an auburn hue, while the hair found on the lathe was more blond."

These three grounds ought to be considered by the Court, if for no other purpose than because they strengthen the motion predicated upon the affidavit of Dr. Harris. When

considered for this purpose, they will add great force to the grounds involved in the testimony of Dr. Harris.

The contention that the hair found upon the lathe was that of Mary Phagan, while greatly stressed by the Solicitor, had very slender support in the evidence. Barrett, Darley and Quinn swore to the physical existence of some hair. Magnolia Kennedy testified that it looked like Mary Phagan's, though she did not know whose hair it was. This evidence, and this evidence alone, was the basis for the State's contention that Mary Phagan's hair, as a result of the assault upon her, had been left upon the lathe on the second floor of the factory.

Consider the testimony of Dr. Harris—that after a microscopic test comparing Mary Phagan's hair with the hair found on the lathe, that he advised the Solicitor that the hair examined did not come from the same head—together with the testimony of these three witnesses, that they did know Mary Phagan, knew the color of her hair, and that the color of the hair found upon the lathe was not of the same color as was the hair of Mary Phagan. Submit to the jury the testimony of these five witnesses, and it must be that any honest jury, would say the hair was not Mary Phagan's and that, therefore, Conley had no corroboration upon the question of hair.

It can not be said that the testimony of these three witnesses is cumulative of any testimony introduced upon the original trial. The defendant found no one who was able to throw any light upon the question as to whether the hair was or was not the hair of Mary Phagan. Miss Grace Hicks, one of the witnesses, did testify that Mary Phagan's hair was darker than hers and that Magnolia Kennedy's hair was nearly the color of Mary Phagan's. But she had no means of comparing the hair on the lathe with Mary Phagan's hair and made no statements as to their identity.

Efforts were made by the attorneys for the defendants to find witnesses who had seen both the hair on the lathe

and had knowledge of Mary Phagan's hair, but no such witnesses were discovered, and the case finally went to the jury on the statement of Magnolia Kennedy alone.

Now is this new evidence merely impeaching in character. It is true that it disputes the testimony of Magnolia Kennedy, but testimony is not merely impeaching because it disputes evidence produced upon an original trial.

The rule is stated in 12 CYC. 741.

> "A new trial will not be granted for newly discovered evidence, which when adduced, will merely impeach or discredit a witness who testified at the trial. If the new evidence is impeaching merely, it is not material whether it consists of evidence tending to prove that a witness had a bad character for truthfulness, but impeaches him by some other method. But if the evidence is material and not introduced solely for impeaching a person, it is the ground for a new trial, though it may be incidentally impeaching."
>
> "The general rule that newly discovered evidence if merely impeaching is not ground for new trial does not apply if the evidence of the impeaching witness is weak and uncorroborated on the trial, and the evidence impeaching him would have been material for the jury to consider and, if heard by them, might probably have changed the result. Daley vs. State, 55 N. W. 241."

It will be borne in mind that the testimony of Miss Magnolia Kennedy was extremely weak; that the evidence of the three witnesses in grounds 2 and 3 would have been material for the jury to consider, and it is beyond doubt that if their testimony had been heard might probably have changed the result.

In the case of Saylors vs. State, 9 Ga. App. 227, the court held:

> "Where, from the evidence submitted in connection with the motion for new trial based on newly discovered evidence, it appears that the testimony relates to material facts which, upon another investigation, would

likely produce a different result and could not by the exercise of ordinary diligence have been obtained at the trial, a new trial should be granted. This is true, even though it be impeaching in its character, if it tends to establish a new and independent fact indicating the defendant's innocence."

In discussing this case on page 229, Justice Russell says:

"It is true that the testimony of these witnesses is to some extent cumulative of the defendant's statement and is in a sense impeaching in its character, but upon another trial, the newly discovered evidence would probably produce a different result. The only question therefore, to be determined under the rulings in Dale vs. State, 88 Ga. 552, and Fellows vs. State, 114 Ga. 233, is whether the showing as to the exercise of ordinary diligence was sufficient, and whether any of the testimony, even though in a sense cumulative, does not tend to establish facts to which no witness testified on the former investigation. As said by Chief Justice Simmons in the Dale case, 'Cumulative evidence is defined to be additional evidence offered to establish a fact to which witnesses have already testified.' It does not necessarily include all evidence which tends to establish the same ultimate or principally controverted fact."

In the case of Mayor and Council of Athens vs. Peeler, 6 Ga. App. 381, Justice Hill, speaking for the court says:

"It will be seen that this evidence is in direct conflict with that of the plaintiff. It is as to a material and substantive fact, and if the jury should believe it, she would have no right to recover. The testimony is not cumulative or impeaching except in the fact that it contradicts the evidence of the plaintiff as to the cause of her fall. This newly discovered witness is duly accredited and the counsel for the city and the proper officials attached to the motion the usual preliminary affidavits as to diligence and want of knowledge before the trial. The evidence meets every requirement of newly discovered testimony. We think that the defendant should have the benefit of this tes-

timony on another trial, especially in view of the fact that the only witness as to the manner of the injury was the plaintiff herself, and this newly discovered evidence was that of a witness presumptively worthy of credit and apparently wholly disinterested in the result of the case. Civil Code, Section 5480; Howell vs. State, 5 Ga. App. 612; Clark vs. Carter, 12 Ga. 500; Thompson vs. State, 60 Ga. 619; Stephens vs. State, 99 Ga. 200."

Impeachment in evidence is an allegation, supported by proof, that a witness who has been examined is unworthy of credit. Powell vs. State, 101 Ga. 9.

> Impeachment as applied to impeachment of a witness in a legal proceeding means an attack on the person's credibility as a witness. The mere conflict between one witness's testimony and the testimony of another witness in regard to some fact is not an impeachment of the former. Baker vs. Robinson, 49 Ill. 299-301.

The most, therefore, that can be said with reference to the testimony of the three witnesses in review is that it contradicts the testimony of Magnolia Kennedy, but said contradiction is not an impeachment, but a contradiction only.

> "When new evidence tends to prove a distinct and material fact and would probably produce a different result, a new trial should be granted, although such evidence tends to impeach the adverse party or his witnesses." Eng. Encyc. of Practice and Pleading, page 810.

It is material to here inquire into the question of diligence. It must be borne in mind that diligence is not to be measured by the result reached. In one case reasonable diligence might bring to light all the material facts, while in another, no matter what the diligence, the material facts might be unobtainable.

The Frank case was not an ordinary case. Public excite-

ment was intense. Prejudice and animosity had been aroused almost universally against him. The public excited by wild rumors and false reports clamored for his blood. Naturally and inevitably witnesses shrank from giving information to his credit. Efforts that in ordinary cases would have brought results accomplished nothing in the face of public clamor and criticism. That this was so an examination of the original motion for new trial abundantly establishes. When evidence was ruled in unfavorable to Frank, the public, even in the court house, showed their approbation by such applause as would greet a favorite comedian. The court was so fearful of private vengeance and bloodshed, that he requested the defendant and his counsel not to appear at the reception of the verdict. He kept in touch with the military and the police, and, acting upon the advice of the newspapers of the city, declined to continue the trial during the Saturday half holiday, fearing that the court and State might be disgraced by riot and bloodshed. So greedy was the public for the blood of this man that a mob of 2,000 surrounded the court house, and cheered with mighty and genuine relish when his doom reached them.

When the public temper and excitement was such, made certain and emphasized by the trial, is there any wonder that the efforts of the defendant and his counsel to discover evidence in his favor were and remained a failure? Few witnesses have the courage in the midst of great public excitement to proclaim facts in favor of one who is the subject of public clamor and hatred.

Frank, himself, had no opportunity to gather the facts necessary for his defense. He was put under arrest Monday after the murder, temporarily released and permanently arrested on Tuesday, and from that date has been incarcerated, with no opportunity to prepare his case or interview witnesses.

L. Z. Rosser, R. R. Arnold, Morris Brandon, and Herbert J. Haas, his only counsel upon the original trial, testified in

the pending motion at length as to the public excitement against Frank and the difficulty encountered by them in obtaining from witnesses any facts in favor of Frank. In their affidavit, they state as follows:

"Upon suspicion being pointed to Frank, he immediately became the center of many sensational stories and of widespread and intense bitterness. The public press, spurred on by the wide interest in the case, published almost daily wild, sensational stories, painting the atrocity of the crime, numberless wild, incredible stories were published about Frank linking him with crime in Atlanta and elsewhere. Among other things, it was published broadcast in the public prints that he had been married before coming to Atlanta; that he had been a criminal in Brooklyn; that since his residence in Atlanta he had made a habit of corrupt practices, such as would, and did, visit upon him widespread contempt and hatred. So widespread were these rumors, not only through the public prints, but by word of mouth, as to the atrocity of the crime, as to facts and circumstances claimed to connect Frank therewith, and of Frank's habitual perversion, that practically the whole community absorbed the idea that Frank was guilty of this crime, and if not guilty of this crime that he was a pervert for whose safety there need be no particular care.

"When the trial began it was apparent that intense prejudice against Frank was widely spread among the people and that he had but few sympathizers or friends. False rumors as to the crime's atrocity and of Frank's connection with it, and to his lack of character, had embittered practically the whole public against him, and he went in the trial of this case in the face of this public prejudice and bitterness. The court house was crowded with men and women, a great majority of whom were bitterly prejudiced against him, and who intensely desired his conviction. During much of the trial, great crowds surrounded the court house, practically all of whom were bitterly antagonistic to Frank. So bitter and unreasonable was this crowd that when the verdict was rendered, they indulged in a great demonstration of delight at Frank's conviction. The con-

ditions surrounding the trial from its beginning to its end is accurately set out in the original motion for new trial and certified by the Judge. At times when the presiding Judge would decide against the defendant, the court would make a demonstration of approval. * * The public prejudice was so great against Frank that it was with the greatest difficulty that any information could be obtained with reference to any facts or circumstances surrounding the crime, which would have been beneficial to Frank. Witnesses who had such information would either avoid giving information, or would give it upon condition that they would not be called as witnesses and that their names would not in any way be associated with the case. Minola McKnight, one of the witnesses for Frank, had been arrested and placed in the station house because she would not give such a statement as met the approbation of the detectives, but was kept in confinement until she gave a false statement. This incident was given the widest publicity by the press, and had the inevitable tendency to prevent people from making any statement in his favor, or giving any information that was beneficial to his case.

"As soon as we were employed we began at once an earnest, active and laborious investigation of all the facts and circumstances of the case. We met with the greatest difficulty in obtaining information, even when such information was in the keeping of people being interviewed, and during the time of our employment up to the date of the trial we gave almost continuous, laborious and earnest effort to discover everything which could throw any light on the facts and circumstances surrounding the case and tending to show the real perpetrator of the crime, and we employed assistants to aid us in the discovery of every fact and circumstance that would throw light upon the crime and its perpetrator. These assistants gave their time to it for weeks and months under the guidance and direction of us, and each of their reports was investigated and verified in an effort to bring to light every fact and circumstance connected with the crime. We, in person, conferred with every person of whom we had any knowledge who was in a condition to know the circumstances surrounding Frank's life before and af-

ter reaching Atlanta, the facts and circumstances of the crime and any fact or circumstance throwing light upon him or the perpetrator of the crime. * * *

"We had heard before the trial that certain strands of hair were found on a lathe on the second floor of the National Pencil Factory, in the metal room. Our recollection is that when the hair was asked for during the trial, it was reported by the Solicitor that it was lost. Our information from the Solicitor and his assistant was that the hair is lost and can not be found. When it was lost, these deponents do not know, but we do know that we have never had any opportunity to see the hair itself, nor did we know that there was in existence, or had been obtained off of the head of Mary Phagan hair with which the hair could be compared with the hair that was found on the lathe.

"We did make extensive inquiry among the employes of the factory, seeking information about this alleged hair, and the only information we were able to get was that one Barrett had found some hair upon a lathe, but we learned of no one who was willing to say whether the hair found was that of Mary Phagan. We had no opportunity to make any comparison between the hair found on the lathe with the hair of Mary Phagan, and we did not know that Dr. Harris, who made an autopsy, had taken some of the hair from Mary Phagan's hair, or that he had made a microscopic examination of the hair found on the lathe and that taken from Mary Phagan's head. * * * *

"With reference to the hair found on the lathe, we made extensive inquiry among the employes of the factory with reference to the information they had with reference to the hair found on the lathe. * * * "

In addition to this general affidavit, the counsel named made a full showing with reference to the testimony of the five witnesses here considered.

Frank made, as will be seen in the record, a complete statement that showed upon his part all the diligence that the most captious could demand.

To this showing by Frank and his counsel, there was no counter-showing. It stands undisputed and there can be no

successful challenge to its sufficiency. No impartial man can look at the surroundings of this case and for a moment doubt the Herculean task that Frank and his counsel encountered in an effort to discover the truth, if that truth were to be beneficial to Frank.

In the case of Hall vs. State, 5 Ga. App. 78, Justice Russell, in discussing ordinary diligence says:

> "But whether ordinary diligence exercised in a special case is to be determined by the peculiar facts and circumstances of each particular case for itself, what might be ordinary diligence under a certain state of facts might fall far short of it under different circumstances. In every case the exercise of ordinary diligence or its absence is to be determined by comparing the conduct under consideration with that of an ordinary man under similar circumstances; and indeed, in some contingencies, inaction may be the result of circumstances such as would cause every other ordinary man likewise to be inactive."

EVIDENCE OF MRS. ETHEL HARRIS MILLER AND MRS. M. JAFFEE.

(Grounds 7 and 18)

Mrs. Ethel Harris Miller testified, inter alia:

> "I and my sister left the store of J. P. Allen a few minutes past one o'clock (April 26, 1913), and were joined in front of the store by a friend, Maier Lefkoff, and all three of us walked together down Whitehall street to the corner of Whitehall and Alabama streets, at which point I and my sister turned on Alabama street and went to Forsyth street, where we caught our car home. On turning the Jacob's Pharmacy corner, just about ten minutes past one o'clock on the afternoon of April 26, 1913, I saw and recognized Mr. Leo M. Frank, who was standing on the sidewalk with a bundle or package under his arm, and said Leo M. Frank recognized and spoke to me, tipping his hat."

She further testified that she did not understand the importance of the fact of seeing Mr. Frank at the time and

place stated until after the trial; and that, after having learned its importance, she was reluctant to tell the facts, as she desired to avoid notoriety and publicity.

Both Lefkoff and Mrs. Max Maier, the sister of Mrs. Miller, affirmed the statement of Mrs. Miller that she was with them at the corner of Whitehall and Alabama streets, at the Jacob's Pharmacy corner, about ten minutes after one o'clock on the afternoon of April 26, 1913; but neither of them knew Frank and did not notice whether she spoke to any one at that corner or not.

Mrs. M. Jaffee testified, inter alia:

> "I left my husband's place of business, No. 70 Whitehall street, either at one o'clock P. M., or a few minutes prior thereto. I came directly therefrom to the Brown & Allen's, at the corner of Whitehall and Alabama streets, just about five minutes past one o'clock on the afternoon of April 26, 1913. As I left this drug store, I recognized Mr. Leo M. Frank, who was standing in front of Jacob's Pharmacy, on the opposite corner, looking toward Whitehall street. I did not speak to him at the time, inasmuch as he was not looking directly toward me at the time I recognized him."

She further testified that she did not know the importance of seeing Mr. Frank at the time and place testified to until some time after the trial ended, and that some time thereafter she notified his counsel of the facts herein sworn to by her.

The importance of this testimony can not be estimated, unless it be remembered that, if Frank was at Jacob's corner at the time testified to by these ladies, the testimony of Conley instantly crumbles.

Conley testified that, at the call of Frank, he went to the second floor of the factory, at four minutes until one o'clock, the time of which he fixed with certainty because he looked at the clock at the front of the factory upon that floor. He said that, in company with Frank, he engaged with him in

either disposing of the body or writing the murder notes until half past one o'clock, when he left the factory, leaving Frank, himself, in the factory. He fixes the time of his departure from the factory, because, after leaving the factory, he walked across the street to a beer saloon and there purchased and drank a "double-header," when he looked at the clock and saw it was twenty minutes until two.

Conley, again and again, in his story reiterates with emphasis that he went into the factory at Frank's call at four minutes until one and did not leave again until one-thirty (1:30).

On the trial of the case, the State unquestionably accepted this statement by Conley and urged it as a safe basis for Frank's conviction.

The State was driven to this, because it was evident from the evidence introduced by the State that at no other time during the whole of the 26th day of April, 1913, could Frank and Conley have been engaged for a time sufficient to conceal the body and write the murder notes, as detailed by Conley. It was conceded by every one that Frank could not have been so engaged prior to 1:30, for until that time a stream of visitors was coming and going at the factory. If Conley's story and the State's theory be accepted, Conley could not have had any such engagement with Frank about half-past two o'clock, for Conley and the State contended that he left the factory in time to halt at the beer-saloon and then reach his home shortly before two o'clock, where he remained until after six o'clock, when Frank himself left the factory. Indeed, this story of Conley's is the very foundation of the State's case. If Frank was in the factory from four minutes until one until after one-thirty, it was physically possible that he engaged with Conley in concealing the body and in writing the notes. If, in fact, Frank was not in the factory from four minutes until one until one-thirty, then Conley's story is demolished; and no honest jury, in sane times, would follow his lead to Frank's conviction. At the trial, both sides recognized this fact.

Although the need to do so was great and pressing, the State furnished no corroboration of Conley, as to this part of his story. Unsupported, this part of Conley's story depended absolutely and alone on Conley's credibility; and, in the intense excitement and prejudice of the hour, the jury accepted it, slimed as it was with impeachment and perjury. The defendant met the story of Conley, and against the character and credibility of the defendant not one word appeared in the evidence.

Helen Kern, a young white girl, testified that she saw Frank standing at the corner of Alabama and Whitehall streets (Jacob's corner) about ten minutes after one o'clock on the 26th day of April, 1913.

Mrs. Leva, a white woman, in no way related to Frank, testified:

> "I saw Frank get off a car at his house on Georgia avenue at one twenty o'clock."

His father-in-law and mother-in-law, Mr. and Mrs. Selig, testified that he reached home at one-twenty o'clock.

The Selig cook, Minola McKnight, testified to the same fact, and further testified that, at the instance of Frank, she telephoned the home of Mr. Ursenbach, communicating there with Ursenbach's cook.

The negro cook of Mr. Ursenbach corroborated Minola McKnight in this respect, as to the reception of the telephone message.

Finally, Albert McKnight, a vicious witness for the State, testified that Frank was at his home at one-thirty o'clock.

From 1:55 P. M. until 3 P. M., when he reached the factory, he was seen by several people. From 1:55 until 2 P. M., he was seen at the Wolfsheimer home on Washington street by Mrs. Michael, Julian Loeb, Jerome Michael and Mrs. Wolfsheimer.

Leaving the Wolfsheimer home, he was seen by Cohen Loeb, who went to the city on the same street car with him;

by P. M. Hinchey on the car in front of the State Capitol; and by Miss Rebecca Carson on Whitehall street.

True, the jury believed Conley's unsupported, contradictory, story as against all these witnesses. But the fact that they did so, is monstrous. No fair man, who will read this negro's story, can escape this conclusion. This action of the jury can only be accounted for by keeping in mind the abnormal conditions that surrounded the trial. The public let go its reason and went mad. The jury, absorbing the mania, went with it. The Frank verdict will never be duplicated. No other jury is likely ever to be found, which will accept such an unsupported statement as against such a score of reputable witnesses, white and black. Conceding, however, the possibility of such a duplication, surely it never can be when the testimony of these two white women is added to the other testimony of witnesses who dispute Conley's story as to Frank's presence in the factory from four minutes until one o'clock until one-thirty o'clock.

Certain it is that this added testimony ought to, and in all human probability will, produce a different verdict if their normal sanity returns to our people.

No attack has been made against the character of Mrs. Miller, nor against her sister, nor against Maier Lefkoff, who were with Mrs. Miller at the time she saw Frank.

It is likewise true that Frank has no recollection of seeing her. It was Memorial Day. The stores were for the most part closed, and the streets were more than ordinarily crowded. Doubtless Frank saw Mrs. Miller, bowed to her mechanically, as he would to any acquaintance, tipped his hat, and the matter made no lasting impression upon his mind. How often do we mechanically bow to our friends and acquaintances, unaccompanied with any lasting mental impression?

An attack was made upon Mrs. Jaffee's character. The State sought to show she had a general bad character, and the defense sought to show that her general character was

good. This conflict ought to be left to a jury. Probably they would believe Mrs. Jaffee when her character was in dispute, as against this negro Conley, whose vile character nobody disputes.

In the case of Hilton vs. State, 9 Ga. App. 420, Chief Justice Hill said:

> "The State made a counter-showing as to the alleged testimony of this proposed witness. Affidavits are produced which attack the general character of the proposed witness, and affidavits are produceed tending to show that he was not present and did not witness the difficulty, as he swears. But this affiant's character is sustained by a half dozen citizens of the County, who swear that his character is good and that he is worthy of belief, and that he worked in the store near the barber-shop of Jim Bob Cochran, the decedent. The weight of the testimony of this proposed witness would therefore be an issue to be determined by the jury. They would be authorized to believe him worthy of credit. And in view of the character of the defendant's witness, who testified as to what occurred at the time of the killing, and the very reasonable hypothesis that, because of their relationship to him, they were not worthy of credit, we think he is entitled to have the question of this proposed witness's veracity passed upon by a jury, because the proposed testimony is so vital to his rights under the law."

It is contended that this evidence is merely cumulative. The ultimate controversy was whether or not Frank was present in the factory from four minutes until one until half past one o'clock. In a sense, any fact illustrating that question would be cumulative, in that it was added to other evidence illustrating the ultimate fact in controversy. But a new and independent fact, although it would tend to prove or disprove the ultimate fact, would not be merely cumulative.

The little Kern girl saw Frank at Alabama and Whitehall streets about one o'clock. Any new fact which sup-

ported her statement that she did see Frank at that time would, of course, be cumulative; but whether Mrs. Miller also saw him at the same place and about the same time is a new and independent fact, which in no sense added to the probative force of Miss Kern's assertion.

Be that as it may, the testimony of Mrs. Jaffee that she saw Frank at five minutes past one is not merely cumulative of the testimony of Mrs. Miller and Miss Kern that they saw him at the same place about ten minutes past one o'clock. Mrs. Jaffee's statement is a new and independent matter. No one on the original trial claimed to see Frank at Jacob's corner on that date. That she saw him at Jacob's corner at five minutes past one o'clock, in no sense supports the statement that he was there ten minutes past one o'clock. Objection can not be made to this argument that it is over-technical. The principle contended for was clearly recognized in the case of Fellows vs. State, 114 Ga. 233. In the discussion of that case, Justice Lewis says:

> "The portion of the affidavit of Hitchcock in which he swears to having seen the accused about four o'clock in the afternoon on the day of the crime, in company with Gaines Johnson, was clearly cumulative, as Gaines Johnson himself testified that he was with the accused at the time and place mentioned; and it is also unnecessary to consider that portion which refers to the meeting of the deponent with Fuller and Ogle, as it merely corroborates testimony as to a particular fact to which other witnesses testified on the trial in the Court below. But the first part of the affidavit, in which the deponent states that he saw the accused between nine and ten o'clock in the morning, presents a very different aspect. No witness testified on the trial of having seen the accused at that time and place. It is true that many witnesses gave testimony going to establish the defense of alibi, but each of these witnesses swore a different fact or set of facts from that offered to be proved by the testimony of Hitchcock. For many reasons, which need not here be discussed, a jury might believe Hitchcock when they would not believe any of the other witnesses who testified to the ultimate fact

of alibi. This evidence was clearly material to the issue in the case, and, if believed, ought to result in the acquittal of the accused."

Nor is this testimony merely impeaching. True, the facts stated contradict Conley's story; but new and independent facts, although contradictory of other evidence, are not merely impeaching. (See the authorities supra.) But grant that this testimony is cumulative and impeaching, there is no doctrine in Georgia asserting that, under no circumstances, newly discovered evidence, merely cumulative and impeaching can not be legally made the basis for a new trial.

Section 6085 of the Code provides: "A new trial may be granted in all cases where any material evidence, not merely cumulative in its character but relating to new and material facts, shall be discovered, etc."

In this section no mention is made of impeaching evidence, and cumulative is modified by the adjective **merely.**

Code Section 6086 provides: "**Ordinarily,** cumulative and impeaching evidence is not a ground for a new trial etc."

This section includes impeaching evidence, but adds the statement that **ordinarily** such is not a ground for a new trial.

Taking these two sections together, beyond a doubt, under the law of Georgia, new trials may (not shall be) granted **in all** cases where material evidence, not merely cumulative, shall be discovered after a verdict is rendered. Whether a new trial shall, or not, be granted, even when the evidence is not merely cumulative and impeaching, depends upon the facts and circumstances of the case. It is equally clear that ordinarily merely cumulative and impeaching evidence will not be the basis for a new trial; but, by the use of the word **ordinarily,** the law-makers have saved to the courts the possibility of granting a new trial even where the newly discovered evidence is merely cumulative and im-

peaching. Ordinarily, new trials will not be granted as the result of such evidence, yet the very use of the word **ordinarily** pre-supposes that, under some conditions, such evidence may be the basis for a new trial.

It is easy to conceive of a case where a refusal to grant a new trial on such evidence would be monstrous. Suppose the Bishop of Atlanta, instead of Frank, had been accused by Conley of colaborating with him in this factory from four minutes of one until half past one, and if, by reason of his supposed fall from his present exalted position, he should be brought to trial in the midst of public excitement, prejudice and hate, that the people had so withdrawn from him their love and confidence, and no one would voluntarily come to his rescue, no matter what his information was, and no one could be found except the little Kern girl to testify that he was not in the factory at the designated time, because she had seen him at Jacob's corner at ten minutes past one o'clock, and that the jury had disregarded her testimony and found him guilty upon the testimony of this negro, alone, and supposing that there had been a reaction of public sentiment, that ordinary sanity and reason had returned to the people, and twenty of Atlanta's best and most trusted citizens should testify that they were present at Jacob's corner at the very time the Kern girl was there and that they, too, saw the Bishop standing at the same corner, can there be any doubt about what would happen? Would this doctrine as to evidence merely cumulative and impeaching be proclaimed as a barrier to a new trial?

It is true that, in a long line of decisions, this Court has declined to grant new trials because the newly discovered evidence was merely cumulative and impeaching, but this Court has not yet decided that, under no circumstances and conditions can such evidence be the basis for a new trial, and it is confidently expected that this Court will never make such a sweeping and far-reaching declaration.

On the contrary, this Court will in the future, as it has done in the past when justice and right demanded it, grant a new trial on newly discovered evidence, even though it be cumulative and impeaching evidence.

In the case of Stephens vs. State, 99 Ga. 200, Stephens was convicted of burglary and breaking and entering the storehouse of N. C. Landers. He was largely convicted upon the testimony of the two sons of N. C. Landers.

The contention of the defendant was that he did not possess himself of the disputed money by burglary, but that he won it from the two sons of Landers while playing poker. This was clearly disproved by the State, the Landers boys testifying that they did not play poker with Stephens on the night of the burglary, nor with any one else. A new trial was sought and had upon the newly discovered evidence of three witnesses, which was clearly impeaching in its character.

In the case of Dale vs. State, 88 Ga. 552, Justice Simmons says: "Some of the newly discovered evidence is not merely cumulative."

A casual reading of that case shows that the new trial was granted in that case because justice and right demanded it, and not because some of the evidence was not merely cumulative.

The same comments may justly be made in the case of Thompson vs. State, 60 Ga. 619.

In the case of Moore vs. State, 11 Ga. App. 259, statement is made in the headnote that "The alleged newly discovered evidence is not merely cumulative or impeaching in its character," but an examination of the facts hardly sustains that statement. The indictment charged Moore with an assault upon one W. B. Attaway. It was testified that he became unconscious at a beer saloon, after drinking several glasses of beer; that when he regained consciousness, he

was at a different place, sitting in a room with the defendant, who was demanding money of him, and on his refusal to give the money, the defendant struck him on the side of the head with a lamp, and he became unconscious. There was other evidence to the effect that the defendant had taken Attaway from the beer saloon to the room in which he was struck.

The newly discovered evidence was that of two persons, who made affidavits to the effect that Attaway stated, in their presence that he was taken from the saloon to the room by persons who insisted that he go to bed and told him that, if he did not do so, he must lose his room, and that he refused to do so and put his hand in his pocket and commenced to draw a knife, when he was struck with a lamp by some one, he did not know by whom.

The reading of these facts would to say the least of it, show that there ought to have been a new trial, although the newly discovered evidence was merely impeaching.

In the case of Fehn vs. State, 11 Ga. App. 328, it is likewise stated that the newly discovered evidence is not merely cumulative or impeaching in its nature.

The facts, however, are these. Fehn was charged with selling liquor in Walker County. John Copeland, a witness testified that,

> "On the 8th day of July, 1910, right opposite where the gate is coming out from the reservation, and on the west side of the car line, at Martin Fehn's place of business, he bought two pints of whiskey from Fehn and paid him seventy-five cents therefor." It was testified by others that "all the land on the west side of the said car line, where Martin Fehn's place of business is located, were in Walker County, Georgia; * * * and that Fehn's place of business was opposite where the gate is coming out of the reservation."

The newly discovered evidence, contained in the affidavits of several persons, was as follows:

"He (affiant) knows Martin Fehn and knew him in 1910, and knows that said Martin Fehn had no place of business or business of any sort at Park City, or in that section, or in Walker County, so far as deponent knows, on July 8, 1910; nor did said Fehn have any business there until July 12, 1910, or 14th."

This newly discovered evidence may not be **merely** cumulative and impeaching, but one reading the case can not escape the impression that the Court of Appeals felt that a new trial ought to be granted, apart from the question of whether the new evidence was merely cumulative and impeaching or not.

In the case of Deason vs. State, 11 Ga. App. 759, the Court again states in the headnote that the new evidence was not **simply impeaching or cumulative.**

The facts of this case, however, are these: "Wallace Perkins testified that Oscar Deason (the accused) sold a quart of 'two-x rye liquor' to him at Deason's house in Claxton on Sunday evening, December 10, 1911, about three or four o'clock, and that Joe Norman was with him at that time."

The newly discovered evidence was two affidavits; one by Joe Norman, who stated that he was not with Perkins, did not see Deason, and was not in Claxton on that Sunday, and never knew of a sale of liquor by Deason; and one by a new witness, who swore that Oscar Deason was with him every minute from two o'clock in the afternoon until after church services at night on the Sunday in question, and at Sunday-school from three to four o'clock and not at Deason's home during any part of that time.

The affidavit of Joe Norman was so clearly impeaching, and the affidavit of the other witness was, to say the least of it, near impeaching.

In the case of Williams, et al, vs. State, 11 Ga. App. 21, it was held: "Under the facts of this case, the showing as to newly discovered evidence required a new trial."

The facts are these: There was only one witness for the State, and he testified that he saw all the plaintiffs in error playing cards for money on the last day in April at a certain sawmill, and that two other men accompanied him to the mill and saw the game in progress.

This witness was sought to be impeached upon the ground of general bad character.

The newly discovered evidence consisted of an affidavit from two persons whom the State's witness testified accompanied him to the mill on the Sunday in question and saw the game, and their affidavits were to the effect that they did not go to the mill on the Sunday in question and did not see any of the defendants in the game charged.

Beyond doubt, this newly discovered evidence was merely impeaching.

In the case of Dougherty vs. State, 7 Ga. App. 94, Justice Hill, after stating that positive and circumstantial testimony was not of the same kind and would not be cumulative one to the other, says:

> "Even merely cumulative evidence, if it has the effect to render * * * might justify a new trial. * * * While the rule that cumulative evidence will not ordinarily warrant the grant of a new trial is firmly established by the statute and decisions of this State * * * does not rest upon any just, logical, or solid foundation. One witness as to the existence of a fact might be believed, although many witnesses as to the existence of the same fact had been discredited by the jury; and where credible testimony has been discovered since the trial, a party should not be deprived of it because other witnesses who were not credible, or at least who were not considered credible by the jury, had been introduced by him in an effort to prove the same fact."

In the case of Grow vs. State, 5 Ga. App., 70, that Court held:

> "Although newly discovered evidence may tend to establish the truth of a material contention in direct

support of which testimony was introduced at the trial, such evidence is not merely cumulative when it relates to a particular fact concerning which no witnesses had already testified. Fellows vs. State, 114 Ga. 233); and when such evidence is adduced from witnesses properly vouched for, and it appears that there was no want of diligence in discovering the new evidence, and that it may probably cause a different result upon another hearing, to refuse a new trial is error."

In the case of Daniel vs. State, 6 Ga. App., 164, Justice Powell held:

> "While a trial judge has the discretion to grant a new trial because of newly discovered evidence which is cumulative in its nature, yet his discretion in refusing to do so will not ordinarily be reversed; especially is this true where the alleged newly discovered evidence bears upon its face indicia which tend so to discredit it that on another trial the result would probably not be changed."

The Williams case, supra, was quoted with approval in the case of Meeks vs. State, 13 Ga. App., 652.

EVIDENCE OF ALBERT M'KNIGHT, DEWEY HEWELL, RUTH ROBINSON, MARIE KARST, IVEY JONES AND J. E. DUFFY.

(Grounds 5, 8, 9, 11, 14, 15 and 17)

We consider these grounds together. Perhaps, taken singly and apart from the other grounds, no one of the grounds would alone be a basis for a new trial, but when considered together they throw a flood of light upon the original trial, illuminate the character of the witnesses employed by the State, and strongly appeal to the Court as aids to the other grounds of this motion.

That the Court can consider them as concomitants and

aids to the other grounds can not be disputed.

In the case of Long v. State, 54 Ga. 566, Justice Jackson says:

> "The affidavit of the policemen alone would not be sufficient to authorize a new trial on the ground of newly discovered testimony, as they constitute only contradictory statements of the prosecutor, but they strengthen the motion predicated upon the other affidavits."

In the case of Dennis v. State, 2 N. E. 349, the Supreme Court of Illinois says:

> "Evidence which destroys or obliterates the testimony on which a conviction was had is not merely cumulative evidence, nor is it simply impeaching evidence."

A cursory examination of these grounds will show that the State's witnesses whose evidence is now embodied in the grounds supra, have practically destroyed their testimony in the original trial.

GROUND 5.

Albert McKnight was a tool and star witness for the State. His false reports resulted in the incarceration of his wife, Minola McKnight, and her retention until she made a false statement.

On the trial (p. 40, Brief of Evidence) he testified:

> "Between one and two o'clock on Memorial Day I was at the home of Mr. Frank to see my wife. He came in close to 1:30; did not eat any dinner. Came in, went to the sideboard in dining room, stayed there a few minutes and then went out and ketched a car. Stayed only about five or ten minutes."

In his affidavit (Ground 5, page 14, Bill of Exceptions) he repudiated the statement made at the trial, saying:

"Since the trial of Leo M. Frank I have been always sorry for the false part I played in it, and since I have had time to reflect on the great wrong I have done, I am determined to tell the truth, and now say that the statement prepared for me by R. L. Craven was not the truth, and that the evidence that I gave at the above-named trial was not the truth. * * * I did not see Mr. Leo M. Frank at all on April 26, 1913, at any time or place."

It is true that after making this affidavit, and after he was, willingly or unwillingly, incarcerated in the station house, he repudiated this affidavit and reaffirmed his evidence at the trial.

That he fully understood that he voluntarily made the affidavit for new trial and understood its import is pointedly established by the affidavits of E. D. Thomas, C. W. Burke, Minola McKnight, Dan S. Lehon, Dan MacIntyre, Jr., Fred Lynn, W. J. Burns, Joe Thompson, Dr. Thos. H. Hancock, H. J. Haas, John Miner and Charles T. Phillips, Jr. (Bill of Exceptions, pages 225 to 233.)

GROUND 8.

Dewey Hewell, the little girl brought from the Home of the Good Shepherd in Cincinnati, testified upon the trial (Brief of Evidence, page 222):

"I have seen Frank talk to Mary Phagan two or three times in the metal department. I have seen him hold his hand on her shoulder; he called her Mary; he would stand pretty close to her; he would lean over in her face."

In this motion for new trial she testified, inter alia:

"I did not even know where Mary Phagan worked in the factory, but I was made to say that I knew her by said Maggie Griffin, and whatever I testified to, either regarding the defendant, or Mary Phagan, was the

result of coaching given me by said Maggie Griffin. During the time of my employment at the National Pencil Factory I never heard any person, male or female, say that the defendant was a bad character, and never saw any wrongdoing on his part."

GROUND 9.

On the trial Miss Ruth Robinson testified, (Brief of Evidence, page 222):

> "I heard him (Frank) speak to her. He called her Mary. That was last summer."

This is important, because Frank had stated he did not know Mary Phagan by name.

In her affidavit for this new trial (Ground 9, page 21, Bill of Exceptions) she testified:

> "I wish to refer to my evidence as given on the stand at the trial of Mr. Frank as to answers to questions of Mr. Dorsey, wherein I was made to say that I heard Mary Phagan called by her first name, Mary. As above stated, I wish to explain that my answer was due to my nervous condition due to the badgering that I had been subjected to by Mr. Dorsey. And as a matter of fact I can not recall any single instance wherein I heard Mr. Frank call Mary Phagan by her first name, and this is the veriest truth. I would not recall or can not recall now, after calm deliberation, that I ever heard Mr. Frank address Mary Phagan by name."

In addition to the above Miss Robinson detailed at length her interviews with the State's officers and the efforts of others to get her to testify in this case.

Thereafter she repudiated this affidavit, claiming that it was a forgery. And in her affidavit of repudiation made charges against Frank wholly inconsistent with her testimony at the trial. (Bill of Exceptions, page 236). That

Miss Robinson did sign the affidavit for new trial is established by the testimony of J. O. Knight, Austin C. Denniston and C. W. Burke.

GROUND 11.

Upon the trial Marie Karst swore that Frank's reputation for lasciviousness was bad (Brief of Evidence, page 221). This was a vital part of the trial.

In Ground 11 for new trial, (Bill of Exceptions, page 25) she repudiated this statement, and asserted that she did not even know what was meant by lasciviousness.

At the instance of the State, Marie Karst repudiated this affidavit.

GROUND 14.

One Burtis Dalton testified upon the trial, in an effort to support Conley, that he had seen women in Frank's office. that Daisy Hopkins introduced him to Frank; and that he had seen Conley around the factory several times on Saturday evenings; that he had seen Frank with beer.

In his affidavit made in this motion for new trial (Bill of Exceptions, page 27) he fully exonerates Frank, telling how it happened that he originally made such an affidavit.

Thereafter at the instance of the State, he repudiated this affidavit, stating that he was induced to make it by certain promises made by one Burke.

GROUND 15.

Ivey Jones testified on the trial that he saw Jim Conley at the corner of Hunter and Forsyth streets on April 26th. "He came in a saloon while I was there, between one and two o'clock. He was not drunk when I saw him. The saloon is on the opposite corner from the factory. We went off

towards Conley's home. I left him at the corner of Hunter and Davis streets a little after two o'clock."

In the affidavit for this new trial he denied having met any one at the time and place he claimed to have met Conley.

At the instance of the State Ivey Jones also repudiated this affidavit.

GROUND 17.

J. E. Duffy testified at the trial (page 223 Brief of Evidence) that when he was hurt in the Pencil Factory, as had been testified to by other witnesses, as follows:

> "A few drops of blood dropped on the floor at the machine where I was hurt. Blood did not drop anywhere else except at the machine. None of it dropped near the ladies' dressing room or water cooler. I had a piece of cotton wrapped around my finger. When I was first hurt I just slapped a piece of cotton waste on my hand."

This evidence was important, because other witnesses had testified that blood from Duffy's finger had dropped near the ladies' closet, thereby accounting for the blood found there by Dr. Claude Smith.

In his affidavit for this new trial (Bill of Exceptions, page 34) he details quite at length how he happened to testify as he did, and then states:

> "It is very possible and quite probable, that blood dropped from my wounded hand upon the floor as I was passing the aforesaid dressing room, and I am not willing to state that blood did not drop from my hand to the floor in front of the dressing room already referred to."

Thereafter, at the instance of the State, and after he was incarcerated in jail, Duffy repudiated this affidavit.

That he swore to the affidavit used in this motion freely, voluntarily and with full knowledge of its contents is proved by the affidavits of Dan S. Lehon, B. Wildauer, Otto Schwab, A. L. Guthman, Albert Haas, Isaac Haas, Herman J. Haas, H. Regenstein, C. W. Burke and J. O. Knight. (Bill of Exceptions, pages 248-249 and 250.)

When these witnesses swore the truth is not now the material matter. The thing that must frighten the unbiased thoughtful man is this: That these are they who caused, as much as they could, this verdict of guilty. Is it possible that such witnesses can aid in doing any man to death? If so, human life is indeed a cheap thing that any perjurer may play with as he will and that too in safety!

EVIDENCE OF MARY RICH AND A. J. BOOZER.

(Grounds 13 and 1 of the First Amendment.)

GROUND 13.

Mary Rich, a colored woman, kept a lunch-stand near the factory, and she first testified that, on April 26, 1913, about two o'clock, Jim Conley came out of an alley in the rear of the National Pencil Company's factory and bought a twenty-cent dinner from her and, after getting the dinner in his hand, went back to the aforesaid alley.

After she disputed this affidavit, her depositions were taken before D. O. Smith, and she testified very reluctantly, insisting that she did not want to testify except in Mr. Dorsey's presence or in court.

Thus testifying, she testified:

"That she knew Jim Conley, and that she saw him on a Saturday that Jim said was Memorial Day; that she saw him after the noon-hour, about two o'clock, and she asked a man, who came along, what time it was, and he said it was two-thirty (2:30) o'clock. When Jim bought the dinner he left, but she did not know in what direction he went."

GROUND 1.

J. W. Boozer testified, inter alia:

> "On April 26, 1913, I was unable to get to the Pencil Factory by one-thirty (1:30) o'clock in the afternoon. * * * On the afternoon of April 26. 1913, after four o'clock in the afternoon as near as I can recall, about four-fifteen (4:15) and certainly somewhere between four and four-thirty (4 and 4:30) o'clock, I came upon and met up with Jim Conley on Peters street, near Castleberry street. I know Jim Conley well and know that Jim Conley was, on the afternoon of April 26, 1913, between the hour of four and fourt-thirty (4 and 4:30) o'clock, on Peters street; and when I came upon him, said Jim Conley was leaning against a pole; and then and there Jim Conley and I spoke to each other and had a brief conversation."

The evidence of these two witnesses is important, because the State contended that Conley left the factory about one-thirty (1:30) and reached his home not later than two (2) o'clock and that he did not leave his home any more until after six o'clock on that day. His excuse that he did not return to the factory and aid in the burning of the body was that he went home, went to sleep, forgot it, and did not get up until six o'clock.

It is true, of course, that the evidence of these two witnesses contradicts Conley, but their testimony is not merely impeaching testimony. Incidentally it contradicts Conley, but it, in addition thereto, states two new and independent facts; one, that Conley bought a lunch in the rear of the factory, on a street near and somewhat in the rear of the factory, at two-thirty (2:30), and that he was on Peters street in the neighborhood of four o'clock.

If the jury should see fit to believe either one of these statements, then Conley's story would crumble.

The general character of Boozer is in issue, some swearing to his good character, and the State producing evidence

contradictory thereto. But, as suggested supra, this is an issue for the jury, and not an issue that this Court can profitably seek to settle.

TESTIMONY OF H. F. BECKER.

(Ground 14½)

One of the mysteries of this case centered around the two notes found near the body of the dead girl, or perhaps one note, for it has never been definitely decided whether the pieces of paper upon which the notes were written were each a part of the same note or different notes. (See Exhibits Y and Z of the Brief of Evidence.) For a while, these notes baffled all inquiry. It was conceded by everybody, in the beginning, that the person who wrote these notes was the murderer. The notes appear in the record, where the Court can, for itself, determine their exact meaning. They purported to be written by the deceased, to describe how she came to be in the basement, and were addressed to the mother of the deceased.

Both of the sheets of paper, upon which these notes were written, belonged to order pads used in the factory.

The method adopted in connection with the purchase of supplies for the factory was as follows: The order, or requisitions, were made on pads, and these pads were made so as to contain duplicate sheets. One of the sheets was an original, made in behalf of the factory, and would be sent to the concern who sold them the supplies. A sheet of carbon paper was placed between the original sheet and the second sheet, which made and constituted a carbon copy, and which was, in all respects, a duplicate of the original order sent out.

Exhibit "Z" was a sheet used for the reception of the carbon copy. Its appearance was such that, when examined with the naked eye, the attention of the examiner would not be attracted except by the note thereon and the letters

and figures appearing at the head of the sheet. After the overruling of the motion for new trial, a closer and more minute examination thereof by a microscope was suggested. Such an examination divulged that there appeared on Exhibit Z the name of one Becker, who had been formerly a master mechanic at the factory.

Upon a discovery of the name of Becker upon the sheet, the matter was taken up with the former master mechanic. From him, it was learned that State's Exhibit Z was a reproduction of a carbon copy used by Becker while in the employ of the pencil factory. The blurred signature, which appears about the center, is his genuine signature. Only the letters "cker" and a characteristic loop made by him at the end of his name were fairly legible. In his opinion, these letters and this loop were made by him. The following appeared near the top of Exhibit Z:

Atlanta, Ga., _____, 190____

Put this order number on your bill.

Bell Phone Main 171. Order No. 1018.

The first line was intended for a date, and the figures after the order number were the figures used to represent the number of the order given.

At the time Becker left Atlanta, which was some time in 1912, the entire file of blanks containing the figures "190__" on the date line had been exhausted and a new stock of order blanks, containing the figures "191__" had been put in use shortly before Becker left Atlanta, and he personally packed up all the duplicate orders on carbon sheets, which he had written and which had been filled, and sent them down to the basement of the factory to be burned. Whether such order was fully carried out, the witness Becker did not know.

Schiff and Zizanki testified that Exhibit Z had thereon the genuine signature of Becker; that it was an order blank,

but one not used in the factory in April, 1913; that the order blank, (Exhibit Z), No. 1018, was used long prior to April, 1913; that when Becker left the factory, he ordered that all the papers in his department be sent to the basement, and that was done.

On pages 32 and 33 of the Bill of Exceptions, a full description of the order books used in the factory on April 26, 1913, and the difference between such books then used for orders and the order blank, Exhibit Z, is fully set out.

The importance of this testimony will be readily seen. Conley testified on the trial that he wrote the notes at Frank's dictation, in Frank's office, on the second floor, and that Frank got the pads off of his desk.

The murder notes were found in the basement; and if the testimony above outlined is true(and it is not seriously disputed), it powerfully supports the proposition that the party who wrote the notes picked up the paper, upon which they were written, in the basement, where they had been deposited by Becker's order.

That these are new and independent facts, neither cumulative nor impeaching, will not be questioned; nor can its materiality be questioned. The only possible issue is one of diligence, and about that there ought to be no real dispute. These notes were in the keeping of the State. Examined with the naked eye, it was impossible to discern thereon the name of Becker, and it does not appear that there was anything on the notes that suggested the use of a microscope even if the notes had been in the possession of the defendant for that purpose.

Becker did not live in Atlanta. There was no opportunity to submit this sheet to him.

The final discovery that the name of Becker was on the sheet was the key which opened up the history of Exhibit Z. Upon examination, he discovered that his name was on the sheet, and that it was put there while he was in charge of the factory; that the sheet, itself, was of a series out

of date, and that all of those out of date series had been sent to the basement by him when he left the factory's employment.

ANNIE MAUD CARTER NOTES.

Bill of Exceptions, Grounds 1-D; page 66.

As already suggested, the murder notes have always been the center around which this dreadful transaction revolves. Conley was forced to admit that he wrote the notes, but claimed that he wrote them at Frank's dictation. He has always contended that the ideas, language and composition of the notes were all Frank's, and that he was the mere automaton or machine that moved at Frank's behest. If it be true that Conley himself composed these notes, there falls at once the whole structure of the State's case. If the thought, language, ideas and composition of these notes are Conley's, there can then be no escape from the proposition that he is the murderer.

Since the date of the murder, Conley has always been closely and carefully confined, and up to the time of the overruling of the motion for new trial, as near as could be, he had been permitted to communicate with no one except the State's chosen agents. As near as the State could plan it, he wrote nothing, said nothing, except such things as were drawn from him by his counsel, the Solicitor-General, the City Detectives, or some other agent for the State.

It has developed, however, that after the motion for new trial had been overruled, Conley engaged in a considerable correspondence; and the defendant's attorneys have succeeded in getting possession of certain love-notes written by Jim Conley, while in jail, to Annie Maud Carter, a negress who was confined therein at the same time. Copies of these notes appear in the record in typewriting. (Pages 68 to 76 of the Bill of Exceptions).

The reputation of Annie Maud Carter was not of the best, but she was the kind of a woman who would appeal to Conley, and to whom he would unbosom himself. She was confined in the same jail, was frequently in and about his cell, and he had frequent opportunities to communicate with her.

While this woman, herself swears positively to the genuineness of these letters and that Conley confessed the murder to her, the question of the genuineness of these letters does not depend upon her testimony. R. P. Butler, N. V. Darley, H. G. Schiff, Eula Flowers, Joe Williams, Joseph Stelker, R. W. Loeb, L. A. Quinn, F. Ziganki, Henry Alexander, an attorney of Atlanta, Ga., and James I. Innes, a prominent specialist in handwriting, testified that the notes are in the handwriting of Conley. Bill of Exceptions, pp. 77-80.

Conley himself made an affidavit in this extraordinary motion, but he did not deny the authenticity of the letters.

No more vicious and vile letters were ever penned by an ignorant African brute. It is a shame that decent men have to examine such letters; but, in this case, it is a heavy burden which cannot be escaped.

The contents of these notes are of first importance. They settle in favor of the defendant at least four vital issues that were raised in the trial.

FIRST:

They establish beyond dispute the depraved, lecherous nature of Conley and his addiction to unnatural and felonious practices. They show him to be a creature capable of rape and murder.

SECOND:

The Solicitor-General in his argument claimed that the existence of the notes sustained Conley, because, as he

expressed it, no negro in the history of the race after having perpetrated robbery or rape ever wrote a note to cover up his crime. These notes established the fact that Conley was a ready and fluent writer; that within the narrow circle of his thought he wrote easily and apparently with pleasure in the exercise of his talent. Not only are the notes in question voluminous and fluent, but they indicate beyond question that the writing of such notes was a frequent exercise with him in which he found no difficulty whatever. These notes also establish this extremely important fact, that the conception and composition of the contents of the murder notes was easily within the range of his mental ability The mind revealed in the murder notes is the same order of mind revealed in the Annie Maud Carter notes. His facility in writing and his evident ignorance of the fact that handwriting of different persons could be readily distinguished were the two traits that suggested to his mind, in his desperate searchings for some method of escape, the plan of writing notes purporting to have been written by the dead girl and charging the crime upon an imaginary negro, the physical opposite of himself.

THIRD:

A great deal was said by the Solicitor-General at the trial about the grammatical use of the word "did" in the first sentence of the murder note on the yellow sheet. He claimed that this was proof that they were written by a white man, the contention being that a negro would have said "done it" instead of "did it." These notes contain this significant evidence; In sentences appearing in the 4th and 7th lines from the bottom of the 69th page of the bill of exceptions, where the word "done" could have been used ungrammatically, appears the grammatical use of the word "did", thus showing that Conley did use this expression grammatically and shattering thereby the argument of the solicitor.

FOURTH:

The Solicitor-General also contended that the use of the word "negro" in the murder notes showed that they were dictated by a white man, the argument being that a negro would have used the word "nigger" and would not have known how to spell "negro". It was argued at the trial in behalf of the defendant that the word "negro" was one of the first words learned by young negroes at school, and that they were taught its use as the correct term to describe their race. This issue is settled by the Annie Maud Carter notes. They contain, in at least two places, the word "negro" written correctly. In no place, in the notes is the word "negro" written "nigger". See eighth line from the bottom of page 69, and 3d line from the bottom of page 71, bill of exceptions.

THE BEARING OF THE ANNIE MAUDE CARTER NOTES ON CONLEY'S NARRATIVE.

The tale told by Conley to the effect that while the murder notes had been written by his own hand, they had been dictated to him, word by word, by Leo M. Frank was so preposterous and so much in conflict with the ordinary course of human conduct as to make it a question by what process of reasoning the verdict finding this tale to be credible and true beyond a reasonable doubt could have been reached. While the trial court declined to set aside this verdict on the ground that it was contrary to evidence, and while this court affirmed this ruling, it, nevertheless, remains true that Conley's narrative was a most extraordinary one and that the verdict stamping it as true was peculiar. Under these circumstances, this Court can readily see that the evidence contained in the Annie Maude Carter notes resolving in favor of the defendant several of the most important contentions made by the state in regard to the murder notes, might well have changed the result

had it been in the possession of the jury at the time of the trial.

Our contention, then, is that Conley's testimony to the effect that Frank had dictated the murder notes to him was of the most peculiar and unusual character, and seemingly in conflict with all the known rules of human conduct, and that such being true, the newly discovered evidence contained in the Annie Maude Carter notes possessed a deep and vital significance which might well have led to a different result had it been in the possession of the jury. Who can say what potent effect the argument of the Soilcitor-General as to the correct use of the word "did" and the use of the word 'negro" may have had upon the minds of the jury? Who can say what effect this revelation of Conley's lustfulness and depravity might have had?

The significance of the Annie Maude Carter notes can only be justly and correctly measured when they are considered in relation to the murder notes and the entire testimony of Conley at the trial, in delivering which testimony he was under the necessity of explaining how, although the notes were written by his own hand, they did not incriminate him. There was no part of Conley's testimony at the trial, however seemingly disconnected it might be with the murder notes, that did not bear directly or indirectly upon them, for the whole purpose of his testimony was an effort to explain how, although these notes were written by him, he was not the murderer, and in order to do this to give the alleged dictation such an environment of circumstances as would make it seem probable. It is proper, therefore, at this point that the Court in order to determine the weight to be given the Annie Maude Carter notes should review Conley's testimony at the trial.

CONLEY'S TESTIMONY ANALYZED.

Conley's story on which the State took its final stand, was as unbelievable as his former admitted perjuries. We

will point out now, one by one, some of the incredible statements in Conley's evidence at the trial.

1. His only explanation of why Frank had him act as "lookout" was to have him lock the front door of the factory upon a signal by stamping; and to unlock it upon another signal, whistling. But the locking of the door was a thing that Frank could do for himself, and after he had locked the door himself, persons who might have entered and interrupted him in any of his alleged practices would have been as effectually barred out as if the door had been locked by Conley. Again, what was the need of a whistling signal to Conley to unlock the door to allow the woman to leave? Could not she unlock it herself, or Frank for her? Why then should this man of reputation, who, as the State claims, was so anxious to preserve his reputation and conceal his practices that he was ready to commit murder, take an irresponsible negro into his confidence in so fearful a secret and so unnecessarily? All that Conley says Frank employed him to do Frank could have done as well for himself. The only thing necessary was to lock the door, and Frank knew how to lock the door as well as Conley.

2. Conley testified that when he watched for Frank there were generally present another man and woman for the same purposes. The question arises, why, if Frank was so careful of his reputation that he was ready to commit murder to preserve it, should he unnecessarily share the secret of his horrible practices with other people?

3. Conley's evidence was that after Frank had murdered the girl, he summoned him to the work of hiding her body by the prearranged signal of stamping on the floor above for him to lock the door. That Frank, under the circumstances portrayed by Conley, did such a thing is incredible. Frank knew that on the fourth floor above him at that time, were J. A. White and Harry Denham. He knew that there were no closed doors on the steps leading up to the

4th floor, or any other obstruction that would cut off sounds from the second floor. The negro was not over fifty steps from him. Twenty-five steps to the head of the stairway and twenty-five steps down the stairway would have brought him to the negro. And yet, standing at the foot of the steps to the fourth floor, in order to call him, he makes an uproar in the still, quiet factory by stamping, which was as likely to summon White and Denham as Conley. It was doubly strange, for Conley testifies that when he spoke to Frank in an ordinary tone of voice, when he was standing near the metal room door, and Frank was at the head of the steps, the latter cautioned him repeatedly: "s—s—s—s—sh." If so anxious to keep Conley from making a sound, why create an uproar himself? Why not walk down the steps to the negro and call him quietly?

4. Conley testified that Frank, by stamping, gave him the signal to lock the front door, and then, in ten or fifteen minutes, before he had gone upstairs, gave him the signal by whistling, to unlock the doors. It is incredible that Frank being about to bring the dead body from the metal room to the front of the factory and then carry it down on the elevator to the basement, would have deliberately ordered Conley to open the doors of the factory. It would seem that if Frank thought it important to have the front door locked to hide practices far less dangerous than murder, he would have kept it locked while he was disposing of the body of a girl whom he had murdered. This was, above all others, the time to lock the door and keep it locked.

5. Conley testified that when he first went up to Frank in response to his whistling, the latter was standing at the head of the steps with a cord in his hand. The question is, what cord? Conley evidently meant the cord with which he had strangled Mary Phagan, but he further testified that he found the body with that cord around her neck. How did the cord get in Frank's hands at the same time?

6. Conley testified that after they had placed the body of Mary Phagan in the basement and written the notes, that Frank began to tell him how he wanted him to burn the body, but that as it was his dinner time, he had to go home to lunch and would have to meet him later to do it. It is incredible that a murderer engaged in the hurried concealing of the body of his victim would take a recess for lunch. The fact is that Conley was in his story compelled to make Frank suspend the concealment of the body in order to go home to lunch because he knew the defense was amply able to prove that he did go home for lunch.

7. Conley testified that when he left the factory at 1:30 p. m. Frank told him and he agreed to return to the factory in about forty minutes to burn the body. Forty minutes after 1:30 is ten minutes past two, but Frank did not return from lunch until three o'clock. The evidence shows that he went home and made his way back to the factory in a leisurely fashion, getting off the street car when it was stopped at Washington street by the people awaiting the memorial parade, gazing idly at the procession while it passed, and buying cigars at a cigar store, thereby arriving fifty minutes late to his appointment. It is incredible that Frank having an appointment of so serious a nature would have been fifty minutes late, especially when he knew that he had locked the front door of the factory and that his alleged assistant, Conley, would not be able to get in unless he were there to open the door.

8. Conley testified that Frank told him to take some "trash" and burn the body. It is incredible that Frank, a graduate of Cornell Institute, who knew the tremendous heat required to cremate a corpse, would have thought it could be done by burning it with "trash." He would have known it would do no good to burn the body partially and that the fearful odor of the burning would have only hastened discovery.

9. Conley testified that Frank gave him $200 in greenbacks for his work, and then took it away from him. It is incredible that Frank would have so trifled with the negro to whom he had confided so awful a secret. Instead of taking away the $200, it is more likely that he would have given him $2,000, or everything he had on earth.

An explanation of how this story of the giving and taking back of the $200, originated reveals the methods by which Conley was tutored and his tale built up. That story appeared first in the last part of the affidavit of May 29th.

We quote it literally and exactly as follows:

> "and then I asked him where was the money he said he was going to give me and Mr. Frank said, 'Here, here is two hundred dollars,' and he handed me a big roll of greenback money and I didn't count it; I stood there a little while looking at it in my hand, and I didn't count it; and I told Mr. Frank not to take another dollar for that watch man I owed and he said he wouldn't—and the rest is just like I have told it before.
>
> "The reason I have not told this before is I thought Mr. Frank would get out and help me out, but it seems that he is not going to get out and I have decided to tell the whole truth about this matter.
>
> "While I was looking at the money in my hands, Frank said: 'Let me have that and I will make it all right with you Monday if I live and nothing happens,' and he took the money back and I asked him if that was the way he done and he said he would give it back Monday.
>
> (Signed) "JAMES CONLEY.
>
> "Sworn to and subscribed before me this 29th day of May, 1913. (Signed) "G. C. FEBRUARY.
> "Notary Public, Fulton County, Ga."

It is as clear as sunlight that after Conley had told of receiving the $200, some one present asked him what he

did with it, and, thereupon, he being unable to account for it, it was suggested to him that he had better say Frank had taken it back. He swore accordingly and it was added in pencil.

10. We mention here two physical impossibilities in Conley's testimony which have been pointed out. Why was there no large blood spot at the point where Conley says he found Mary Phagan's body lying with a gaping wound in her head next the floor? How reconcile the absence of blood at this point, and the alleged blood spot by the dressing room where Conley says he dropped her and the body lay only for a few minutes? If there was blood in one place why not in the other, especially as in the former there had been less time for it to congeal?

11. How explain the fact that although Conley says that the body of Mary Phagan was picked up and carried all the way from the metal room to the place in the basement where Newt Lee found it, the face was so covered with dirt and cinders that the police officers could not tell whether she was a white woman or a negress?

12. Conley testified as an explanation of his willingness to write notes for Frank and to assist him in disposing of the body, that "Mr. Frank was a white man and his superintendent and he was willing to do anything for him." It is unlikely that to a negro of Conley's intelligence such reasons would have had any weight or offered any inducement to help in so dangerous a business. It is more likely, conceding that a white man could be so great a fool as to take an irresponsible and shiftless negro into his confidence for so terrible a purpose, the negro would have simply refused through his instinct of self preservation.

13. It was necessary for the State to offer some explanation of the series of perjuries of its star witness. It was necessary to explain how affidavit after affidavit was made only to be repudiated and admitted to be a perjury. The ex-

planation was that the truth was withheld by Conley in order to protect Frank, only letting it out by piecemeal in order to frighten Frank into efforts to have him, Conley, released. A reading of the successive perjuries discloses the absurdity of this claim. It was not merely an adding of new statements, but it was also an express denial of statements already made and a substitution of totally different statements for them. The first affidavit made, that of May 24th, was more than sufficient in itself, if true, to have sent Frank to the gallows. Conley "gave Frank away" all at once. It was not a gradual process in order to frighten him.

Moreover, in the final affidavit of May 29th, Conley stated that he realized then that Frank was in a hopeless condition; that he could no longer expect any help from him; and that he proposed, therefore, to tell the whole truth and all that he knew about the murder. The exact language of this affidavit on this point was:

> "The reason I have not told this before is I thought Mr. Frank would get out and help me out, but it seems **that he is not going to get out** and I have decided to tell the whole truth about this matter."

Now in this statement made on May 29th, Conley declares that he realized that Frank was unable to help him and that there was no longer anything to be gained by his holding back the truth and that, therefore, he would tell the whole truth. How then can he be believed when, after two months, he goes on the stand at the trial on August 4th, and tells an entirely different story from that in the affidavit referred to, and attempts to explain the radical change in his narrative by the same explanation, to wit: that he was holding back part of the truth and letting it out by piecemeal in order to frighten Frank into efforts to have him, Conley, released. He had already stated more than two months before that he realized Frank was in a position where he could not help him.

The real explanation is that after Conley made each of his successive affidavits, his advisers discovered, on further reflection, that they would not support their case and that it would be necessary to change and revise them.

Take, for example, the four accounts given by Conley of the writing of the notes. In the first three, he states distinctly that he wrote the note on the white paper and that Frank himself wrote the note on the yellow paper. In the fourth, his testimony on the stand, he swears that Frank dictated both notes to him and that he wrote both of them himself. This was certainly not a gradual disclosure of the truth. It was a substitution of materially different statements. The first three accounts, if true, connected Frank with the writing more closely than the fourth by representing the writing of the yellow note to have been his own personal act. There can be no doubt that Conley would have clung to his statement that Frank wrote one of the notes himself if they had not finally succeeded in making him understand that his handwriting and Frank's were entirely different and could be easily distinguished.

Indeed, the fact is that Conley never did thoroughly understand this. This is shown by part of his testimony on the stand. In narrating his alleged conversation with Frank, he said in part:

> "and he said, 'Can you come back this evening and do it?' (meaning burn the body), and I said 'Yes, that I was coming to get my money.' He said, 'Well, I am going home to get dinner and you come back here in about forty minutes and I will fix the money,' and I said, 'How will I get in?' and he said, 'There will be a place for you to get in all right, **but if you are not coming back let me know, and I will take those things (meaning the notes) and put them down with the body,' and I said, 'All right, I will be back in about forty minutes.'**"

The above excerpt contains one of the most preposterous and evidently untrue statements that Conley made.

He represents Frank, who, according to him, had just committed a murder and had had the body of the victim taken to a place of concealment, explaining freely and openly to him, Conley, that he, Frank, was planning to take a specimen of his, Conley's, handwriting and place it by the corpse to conceal his, Frank's, guilt. Of course, neither Frank or any other educated person who understood the individuality of handwriting would have ever revealed to the person whose handwriting they expected to use in such a way that such was their plan, as common sense would have told them that the person whose handwriting was to be so used would most strenuously object. Even if Frank had committed the murder and had planned to put Conley's notes by the corpse, he would most certainly never have let Conley know that he intended to do so. To tell Conley this, was equivalent to telling him that he was arranging to put the guilt of the murder upon him and to have him hung, for Frank had no way of knowing and did not know that Conley was ignorant of the individuality of handwriting.

This statement, in which Conley evidently saw nothing unreasonable or absurd, shows that he was still unable to grasp the idea that there was a difference in handwriting. It seemed to him entirely reasonable to say that he was perfectly willing that Frank should take specimens of his handwriting and place them by the murdered girl. The prospect did not alarm him in the least. He simply did not comprehend the fact that handwriting was a certain clew leading almost inevitably to detection. The blunder contained in this statement and in his previous statements that Frank wrote one of the notes with his own hand is exactly the same blunder made by the author of the murder notes, that is, a failure to realize the individuality of handwriting, and demonstrates conclusively that they all originated in the same mental source, Conley's brain.

We give below those parts of his four successive state-

ments relative to the writing of the notes. These incidentally show how great his difficulty was to understand that all handwriting was not alike and could be easily told apart. It was only a person who had such difficulty that could have written the murder notes and placed them by the body in the expectation that they would be taken as the writing of the murdered girl.

Statement of May 24th, 1913.

"On Friday evening before the holiday, about four minutes to one o'clock, Mr. Frank come up the aisle and asked me to come to his office. That was the aisle on the fourth floor where I was working, and when I went down to the office he asked me could I write and I told him yes I could write a little bit, and he gave me a scratch pad and told me what to put on it, and told me to put on there 'dear mother,' 'a long, tall black negro did this by himself,' and he told me to write it two or three times on there. I wrote it on a white scratch pad, single ruled. He went to his desk and pulled out another scratch pad, a brownish looking scratch pad, and looked at my writing and wrote on that himself, * * * and then he asked me where Gordon Bailey (Snowball they call him) was, and I told him on the elevator, and he asked me if I knew the night watchman and I told him no sir, I didn't know him, and he asked me if I ever saw him in the basement and I told him no sir, I never did see him down there, but he could ask the fireman and maybe he could tell him more about that than I could."

Statement of May 28, 1913.

"And he said, 'Jim, can you write?' He was sitting down facing me and he brushed back his hair and I said 'Yes, sir, I can write a little bit, Mr. Frank,' and then he give me a pencil that he got off the top of his desk, and there was nothing on it, he turned a sheet over for me to write, and then he told me what to put there, he told me to put on there 'dear mother, a long tall black negro did this by hisself,' and when I put down "negro" I put it "n-e-g-r-o-s" and he said don't

put no 's' there, he said that means negros and he said now rub the 's' off and I rubbed the 's' out, and he said, 'it means just one person like yourself,' and he told me to write it again and I written it, and he looked at it and slapped me on the back and said 'That's all right, old boy,' and he said 'write it again,' and I written it for him three times. * * * * * 'and then Mr. Frank told me he was going to take that note I had written and send it off in a letter to his people when he wrote, and recommend me to them, because I was a good working negro around there, and he liked me. * * * * and I saw him go to his desk and take out a brownish-looking scratch pad. The one I wrote on was white and was single ruled and I saw him take out a brownish-looking one from his desk and he took his pencil and made a mark on it. I took it to be an "M" but he shut the tablet up and looked at me and told me that was all he wanted with me."

Statement of May 29, 1913.

"and Mr. Frank then asked me to write a few lines on that paper, a white scratch pad he had there, and he told me what to put on there, and I asked him what he was going to do with it and he told me to just go ahead and write, and then after I got through writing Mr. Frank looked at it and said it was all right."

Conley's Testimony at the Trial.

"and then he said, 'Can you write?' and I said Yes, sir, a little bit,' and he taken his pencil to fix up some notes. I was willing to do anything to help Mr. Frank because he was a white man and my superintendent, and he sat down and I sat down at the table and Mr. Frank dictated the notes to me. Whatever it was it didn't seem to suit him, and he told me to turn over and write again, and I turned the paper and wrote again, and when I done that he told me to turn over again and I turned over again and I wrote on the next page there, and he looked at that and kind of liked it and he said that was all right. Then he reached over and got another piece of paper, a green piece, and told me what to write. He took it, and laid it on his desk and looked at me smiling and rubbing his hands."

CONLEY'S FIVE SUCCESSIVE STATEMENTS.

If Conley's story had been true, i. e., that he was a simple and unwitting tool of Frank in concealing the murder, he would have come out with the whole truth at once as soon as arrested. A sense of loyalty to Frank would not have restrained him a moment. Whoever heard of a negro who owed no more to a white man than Conley did to Frank jeopardizing his life and liberty in order to serve him?

Conley made five (5) statements regarding the crime:

1. The unsworn statement of May 18th in which he denied any knowledge of the notes or the crime. See defendant's Exhibit 36 in brief of evidence on first motion for new trial.

2. The affidavit of May 24th in which he said Frank dictated one of the notes to him on Friday, the day before the murder, and wrote the yellow note himself. See defendant's Exhibit 37 in brief of evidence on first motion for new trial.

3. The affidavit of May 28th in which he said Frank had dictated one of the notes to him on Saturday and explaining his presence at the factory by an accidental meeting with Frank, stating also that Frank wrote the yellow note. See defendant's Exhibit 38 in brief of evidence on first motion for new trial.

4. The affidavit of May 29th when he first told his story of hiding the body. See defendant's Exhibit 39 in brief of evidence on first motion for new trial.

5. His testimony at the trial beginning August 4th in which he said he wrote both notes.

These five successive perjuries were the transparent result of Conley's effort, aided by the detectives, to frame up a story that would fit in with the known, undisputed facts,

and particularly the damning fact that he had written the notes found by the corpse attempting to put the crime on a "long tall black negro."

After he had strangled the little girl and was confronted with the question how to escape, he did not know that handwritings differed and that a person could be traced by handwriting. Hence he wrote the two murder notes, which he thought would seem to have been written by the little girl to her mother to tell her that she had been strangled by a long tall black negro and left them by the body. That he felt confident of his scheme is shown by the fact that he wrote two notes, and that he stayed on the ground and did not flee. He was absolutely confident of the success of his device which he felt was a very clever scheme. He was terribly horrified when he learned from reading the papers on Monday and the following days before his arrest that the police were not looking for a "long tall black negro" at all, but, on the contrary, trying to locate the person who had written the notes. He was astonished to find that no one had been fooled into thinking that the notes had been written by Mary Phagan and that he had only laid a terrible trap for himself. He thus learned for the first time that there was a difference in handwriting, and that persons could be traced and identified by their handwriting. He read in the papers how the police were compelling each of the suspects, Lee, Gantt, Mullinax and Frank to write at dictation portions of the notes found by the body in order to compare the handwriting, and that the sentence used for this dictation was the last of the white note "but that long tall black negro did buy his self." It was then and there that Conley first heard of dictation and learned what dictation was. All this time, he was in terror at the though that he had left by the body the telltale notes, and he was torturing his brain to work out some explanation, should it be learned that they were in his handwriting.

Suddenly and unexpectedly, on May 1st, on slight suspi-

cion, he was arrested and taken to police headquarters, and when they sought to dictate to him words from the notes, he, of course, denied that he could write, and that denial he maintained. In some way the detectives on the case became suspicious and one of them undertook to investigate and determine whether Conley's statements that he could not write were true. About May 14th, he went over to the pencil factory and there learned from the factory people that Conley could write. In this way the factory people got their first information that he was denying that he could write Leo Gottheimer, one of the salesmen of the factory, immediately hurried over to the jail and told Leo Frank in his cell of the inquiry. Frank at once informed him that Conley could write and, after a few moments thought, told him how he could find the name of the installment jewelers with whom he knew that Conley had made a contract for the purchase of a watch on partial payments He told Gottheimer where he could find in his desk in the office of the factory receipts for payments made to the collector of the jewelry people to whom he had made payments out of Conley's wages. Gottheimer hurried back to the factory with the information, placed it in the hands of the detective, and in a short time they had located the contract with Messrs. Patrick & Thompson, of Atlanta, signed by Conley showing Conley's signature.

On May 18th, Pierce, of the Pinkerton Detective Agency, confronted Conley with this contract and forced him to admit that he could write.

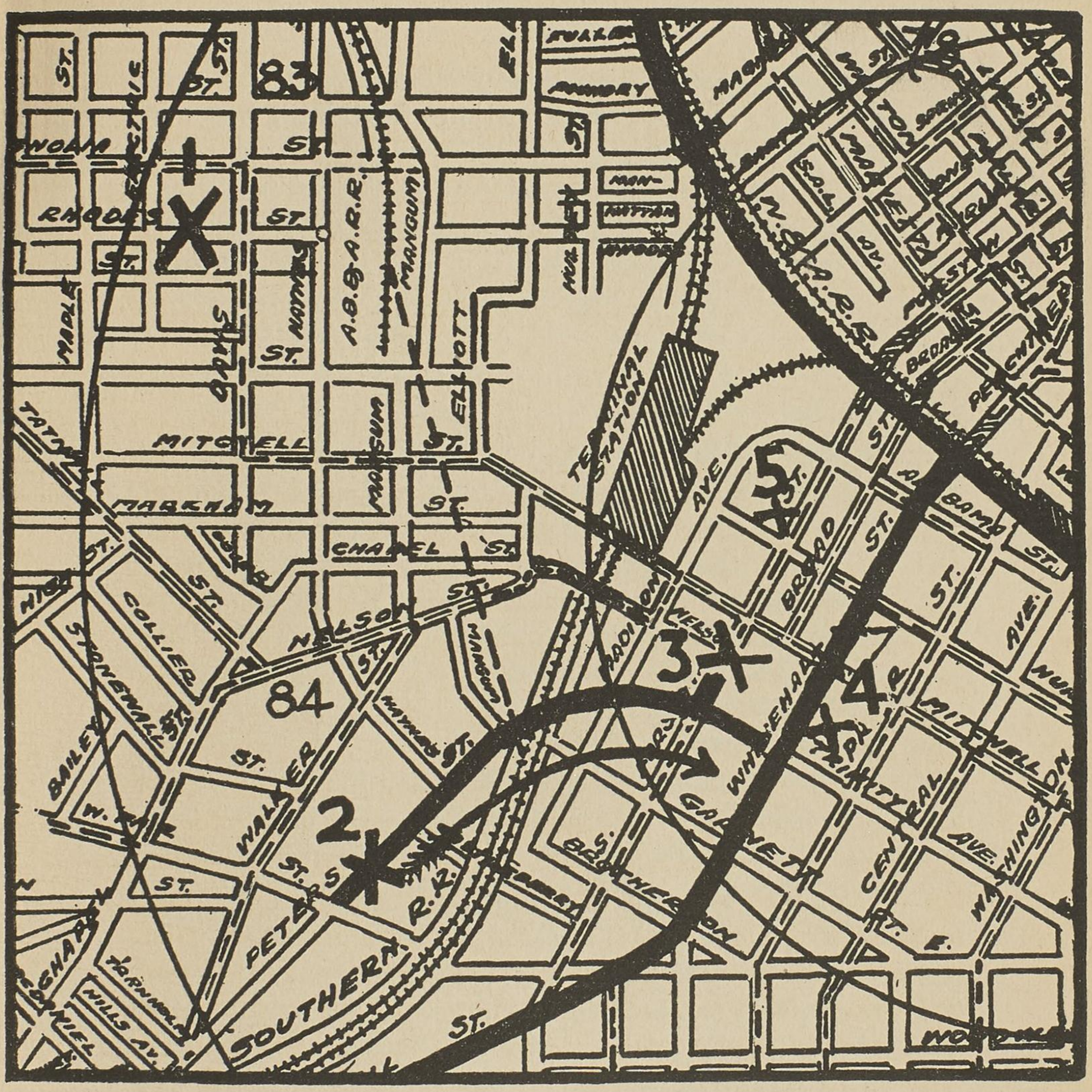
Conley then knew that to save his neck, he must devise some means to account for his writing of the notes. Fully appreciating the fact that the suspicion of the public was turned strongly upon Leo Frank, that it wanted him convicted, and that the detectives were bending every effort to convict him, it was not difficult, in working out a device by which he could protect himself, to see that he must put himself in the position of an innocent tool in the writing

of the notes. He saw that it was necessary to say that Frank dictated the notes to him, just as he had learned through the newspapers that they had dictated the notes to Lee and Gantt and the others. He knew that if he could do this successfully, he could put the guilt of the murder upon Leo Frank, making himself appear only as a simple, deluded negro who had unwittingly made himself a party to the crime.

On May 18th, the detectives allowed him to make an unsworn statement. Although knowing then that he could write, they took from him a statement the substance of which was that he had spent the day of the murder at home on Peters Street, and in other places, none of which were within a quarter of a mile of the factory. But he saw that that story could no longer stand, and in a few days on May 24th, the morning of the day on which Frank was indicted, he came forward with his first admission of the writing of the notes.

In carrying out his plan to make himself an innocent tool in the writing of the notes, he realized two difficulties. The first was that he instinctively tried to make no admission that acknowledged that he was at the factory on the day of the murder. Another difficulty was that he could not readily think of any satisfactory explanation of how he came to be at the factory on the day of the murder. It was known that the factory was shut down that day; that he had received his wages on the Friday previous, and that he had no duties calling him to the factory that day. The first affidavit, therefore, was shaped by these difficulties, and he swore that on Friday at four minutes to one o'clock Frank called him to the office and dictated one of the notes to him. But the idea was preposterous that Frank was preparing on Friday to commit an unpremeditated murder on the following day and had gotten him, Conley, to write a note to conceal it. A reading of this affidavit shows that the negro admitted writing only one note, that on the white

paper, and he states that the other note was written by Frank. He goes on further in his small cunning, to state that Frank asked him about the fireman and the night watchman, intending to suggest that the questions were asked in order to put their names in the note that Frank wrote. He also stated that Frank told him that he had wealthy people in Brooklyn, and then he held his head up and looking out of the corner of his eyes said, "Why should I hang?" Let us pause here for a moment to say that how any jury or any community could be willing to take a man's life upon the testimony of a creature who was caught even once in so preposterous a lie is beyond comprehension. The detectives then went to Conley and explained that the affidavit was unbelievable and the absurdity of saying that the notes were written on Friday was explained to him. On May 24, he made an effort to "do better," but with poor results. The detectives had made him understand that he must put the writing of the notes on Saturday, but the question then arose, how to explain his presence at the factory on Saturday? They realized that he had no business at the factory, and it was a difficult problem. They finally hit upon the expedient of an accidental meeting on Saturday morning between him and Frank, and Conley was led to say that when he left his home on Rhodes Street, he went to Peters Street, and from Peters Street, he went to see his mother at the Capital City Laundry, located near the corner of Whitehall and Trinity avenue, a direct extension of Peters street. He swears that in going to the laundry he met Leo Frank at the corner of Nelson and Forsyth Streets.



EXPLANATION.

Arrow indicates Conley's route from Peters street to Capital City Laundry.

1. Conley's house, 172 Rhodes street.
2. Saloons on Peters street from which point he started to the laundry.
3. Corner of Nelson and Forsyth streets, alleged meeting place between Conley and Frank, showing the point a block off his route.
4. Capital City Laundry near corner of Whitehall street and Trinity avenue.
5. Location of Pencil Factory.

Sometimes perjury is revealed by apparently a very slight circumstance. A map of that portion of Atlanta, which we herewith attach, with a line indicating Conley's course from the saloons on Peters Street to the Capital City Laundry, shows that it was entirely unnecessary for him to have passed the corner of Nelson and Forsyth Streets, and that his going to the corner of Nelson and Forsyth Streets, as he states, was a block out of his way. What caused him to turn off from a street running to the laundry? He did not explain and could not.

But there was another trouble with this affidavit which ultimately forced the detectives to shift their ground. As it stood, it contained this absurdity. It represented Frank as having made the negro, whom he meets purely by chance at 10 o'clock in the morning, accompany him to the factory in order that, two hours later, he might write notes for him to conceal an entirely unpremeditated murder. This was as preposterous and unbelievable as the first affidavit which they had rejected, and, as might be expected, they shifted their ground. On May 29th, another affidavit was made as a supplement to the preceding made on May 28th, but it did not alter the theory of an accidental meeting.

After these affidavits, nothing more came from Conley until the trial. But, in the meantime, the absurdity of the story embodied in the affidavit of May 28th, explaining Conley's presence at the factory by an accidental meeting with Frank began to dawn upon those concerned, and they realized that changes and additions were necessary. They saw that they had not yet explained Conley's presence at the factory on Saturday, and that it was preposterous to say that Frank had arranged with this negro, whom he met accidentally at ten o'clock, to write murder notes for him a little after 1 o'clock to conceal an unpremeditated murder. Thus was evolved by necessity the idea of a previous intimacy between Frank and Conley in which Conley was to be shown as Frank's "lookout" in crime, and, in order to

get away from the accidental meeting, he swore that his presence at the factory on Saturday morning was the result of an understanding between him and Frank **made on Friday, the day before.**

The greatest absurdity, however, the defect calling most urgently for remedy—was the statement in the affidavit of May 29th, to the following effect.

> "On Saturday, April 26, 1913, when I come back to the pencil factory with Mr. Frank I waited for him down stairs like he told me, and when he whistled for me I went upstairs and he asked me if I wanted to make some money right quick, and I told him 'yes, sir,' etc."

This was a statement in effect that Frank had voluntarily, and without the least reason for doing so, taken Conley into the secret of his alleged murder. Conley represents himself in that affidavit as getting his first intimation that a murder had been committed from Frank. So that according to that statement, **Frank, without any necessity for doing so, voluntarily took an irresponsible negro into his frightful secret and for no other purpose than to have the negro assist him in carrying the body into the basement**—a thing that he could have done himself unassisted.

In the period that elapsed between May 29th, when the affidavit was made, and the 4th of August, when he took the stand, Conley and his advisers had realized that this statement was preposterous, and the necessity for "fixing it up" was acutely felt. To accomplish this purpose, Conley was tutored to say on the stand that he saw Mary Phagan go upstairs towards Frank's office and heard her scream in the metal room. **Prior to this, he had denied most bitterly that he had seen Mary Phagan enter the factory.** His tutors perceived that if Conley testified that he saw Mary Phagan go upstairs, that he heard her scream, and that Frank knew that he had seen and heard her, it

would sound more reasonable to say that Frank had taken him into his secret. This is the reason why Conley on the stand stated that he saw Mary Phagan go upstairs and that he heard her scream, and this is why he was tutored to say that Frank, when he first called him upstairs, asked him had he seen Mary Phagan go up. **It was for no other purpose than to supply a motive to Frank in taking Conley into his confidence, a thing in which, up to that time in his narrative was wholly lacking.**

The charge that the detectives tutored Conley in his successive statements and in his evidence is proven by the testimony of the detectives themselves. If the internal evidence in the notes themselves was not in itself sufficient to establish this, certainly the evidence of the Pinkerton Detective Scott would remove all doubt on this point. In his testimony at the trial, and with the utmost complacence, he gave the remarkable testimony, which has been already set forth in this brief on page five.

In the light of Conley's preposterous evidence, of his wholly incredible explanation of the writing of the murder notes, any evidence throwing light on him as a note writer and his mental ability to have conceived and composed the murder notes is of vital importance, and we respectively submit that the court should give the defendant an opportunity to have Conley's testimony again passed upon in the light of this additional evidence.

Respectfully submitted,

R. R. ARNOLD,

ROSSER & BRANDON,

HERBERT J. HAAS,

LEONARD HAAS,

HENRY ALEXANDER.

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